Supreme Court, U. S.
FILED
JUN 20 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1608

National Association for the
Advancement of Colored People, et al.
Cross Petitioners

v.

Federal Power Commission
Petitioner

CROSS-PETITION FOR A WRIT OF CERTIORARI
To The United States Court
of Appeals for the District
of Columbia Circuit

Howard A. Glickstein
Notre Dame Center for
Civil Rights
Notre Dame, Indiana 46556

William L. Taylor
Catholic University Law
School
Washington, D.C. 20064

Counsel for Cross Petitioners

TABLE OF CONTENTS

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

THE IMPORTANCE OF THE QUESTIONS PRESENTED 8

I. THE COURT OF APPEALS' NARROW READING OF THE FPC'S STATUTORY DUTY TO REGULATE IN THE PUBLIC INTEREST IMPROPERLY LIMITS THE AGENCY'S RESPONSIBILITY TO PREVENT EMPLOYMENT DISCRIMINATION BY ITS REGULATEES 9

A. The Federal Power Commission Has Broad Power To Regulate In The Public Interest 9

B. The FPC And Other Federal Agencies Must Cooperate In The Implementation Of The National Employment Nondiscrimination Policy 12

II. HAVING FOUND THAT THE FPC HAD JURISDICTION OVER EMPLOYMENT DISCRIMINATION FOR THE LIMITED PURPOSE OF PROTECTING CONSUMERS FROM ILLEGITIMATE COSTS, THE COURT BELOW ERRED IN REFUSING TO REQUIRE THE AGENCY TO ADOPT RULES TO EFFECTUATE ITS JURISDICTION 14

BEST COPY AVAILABLE

III. THE LOWER COURT FAILED TO RECOGNIZE THE FPC'S CONSTITUTIONAL DUTY TO PREVENT EMPLOYMENT DISCRIMINATION BY ITS REGULATEES 16

CONCLUSION 21

CERTIFICATE OF SERVICE 22

APPENDIX A: Relevant Sections of the Federal Power Act and Natural Gas Act.

APPENDIX B: Opinion of the Federal Power Commission (No. 623, July 11, 1972).

APPENDIX C: Order of the Federal Power Commission Denying Petition for Rehearing (August 21, 1972).

APPENDIX D: Opinion of the United States Court of Appeals for the District of Columbia Circuit.

APPENDIX E: Judgment of the United States Court of Appeals for the District of Columbia Circuit.

TABLE OF AUTHORITIES

Cases:

Bolling v. Sharpe, 347 U.S. 497 . . . . . 17, 19

City of Lafayette, Louisiana v. Securities Exchange Commission, 454 F.2d 941 (C.A.D.C.) 10

Cooper v. Aaron, 358 U.S. 1 17

Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn.) 18

Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio) 18

Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), affirmed sub nom. Coit v. Green, 404 U.S. 797 18

Jackson v. Metropolitan Edison Company, 419 U.S. 345 . . . . . 17, 19

Jackson v. Statler Foundation, 496 F.2d 623 (C.A. 2) 17, 18

Johnson v. Railway Express Agency, 43 USLW 4623 13

Lombard v. State of Louisiana, 373 U.S. 267 18

McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 18

McGlotten v. Connally, 388 F. Supp. 448 (D.D.C.) 18

Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (C.A.D.C.) 10

Oregon v. Mitchell, 400 U.S. 112 19

Palisades Citizens Association v. CAB, 420 F.2d 188 (C.A.D.C.) 11

Peterson v. Greenville, 373 U.S. 244 18

Southern Steamship Company v. National Labor Relations Board, 316 U.S. 31 10

Turner v. City of Memphis, 369 U.S. 350 18

United Packinghouse, Food & Allied Workers International Union v. N.L.R.B., 416 F.2d 1126 (C.A.D.C.), cert. denied, 396 U.S. 903 13

Constitutions and statutes:

U.S. Constitution:
Fifth Amendment 3, 16, 17, 19, 20
Fourteenth Amendment 3, 19

Civil Rights Act of 1964
42 U.S.C. 2000e 12

Equal Employment Opportunity Act
42 U.S.C.A. 2000e-14 (Supp. July 1972) . . 12

Federal Power Act, 16 U.S.C. 791 et seq. . . 3, 5
Section 313 (b) 6

Natural Gas Act, 15 U.S.C. 717 et seq. . . . 3, 5
Section 19(b) 6

Executive and Regulatory Materials:

FPC Regulations
18 C.F.R. 1.7(b) 4

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

National Association for the
Advancement of Colored People, et al.

Cross Petitioners

v.

Federal Power Commission

Petitioner

CROSS-PETITION FOR A WRIT OF CERTIORARI
To The United States Court
of Appeals for the District
of Columbia Circuit

The cross-petitioners, the National Association for the Advancement of Colored People, et al., pray that in the event the Court should grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 5, 1975, this cross-petition for a writ of certiorari should likewise be granted.

OPINION BELOW

The opinion by the Court of Appeals, not yet reported, and the opinion of the Federal Power Commission (No. 623, July 11, 1972), are included herein as Appendices D and B respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 5, 1975. After having granted the Solicitor General an extension of time to allow the Federal Power Commission to file a petition for certiorari (see infra, p.8), this Court granted cross-petitioners an extension of time to and including June 20, 1975, for the purpose of filing a cross-petition for writ of certiorari. This order was signed May 8, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission, pursuant to its mandate to regulate in the "public interest," has both statutory authority and responsibility broadly to proscribe employment discrimination in the industries it regulates.

2. Whether, having found that the Federal Power Commission had jurisdiction over employment discrimination for the limited purpose of protecting consumers from illegitimate costs, the court below erred in refusing to require the agency to adopt rules to effectuate its jurisdiction.

3. Whether the Federal Power Commission, by reason of its extensive involvement in the regulation of the gas and electric utility industries, has a Constitutional duty to proscribe employment discrimination by the companies it regulates.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

U. S. CONST. AMEND. XIV, SEC. 1

> . . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL POWER ACT
16 U.S.C. 791 et seq.

Sections 4(e), 201(a), 205, 206 and 309 are set out in Appendix A.

NATURAL GAS ACT
15 U.S.C. 717 et seq.

Sections 1(a), 4(a) - 4(e), 5(a) and 5(b), and 7(a), 7(c) and 7(e) are set out in Appendix A.

STATEMENT OF THE CASE

Cross-petitioners, a group of civil rights, public interest and employee organizations, on June 22, 1972, filed with the Federal Power Commission a petition for issuance of a rule requiring nondiscrimination in employment pursuant to subsection 1.7 (b) of the Commission's Rules of Practice and Procedures 18 CFR 1.7 (b) (J.A. 1-53).*

The petition filed with the FPC alleged that there is substantial evidence of severe and widespread discrimination in the gas and electric utility industries (J.A. 2, 7-19). Among major industries, the utility industry in 1972 had the lowest number of minority and women employees and the largest proportion of these were in lower paying menial positons (J.A. 11-16). Cross-petitioners argued that existing statistical and other evidence required the Commission to take corrective action under its authorizing statutes, which charge the Commission with safeguarding the public interest through the exercise of regulatory power over the electric energy and natural gas industries.

Cross-petitioners urged that the Commission must consider matters of fundamental national policy, such as nondiscrimination in employment, in its determination of the public interest (J.A. 23-24). Cross-petitioners additionally claimed that the Constitution requires such consideration, lest the Federal government become a partner to private discriminatory actions (J.A. 31-35)).

---

* "J.A." refers to the Joint Appendix filed with court below.

The Commission has prohibited discrimination in the use of some licensed facilities on the same rationale (J.A. 35-36), and other similar Federal regulatory agencies have exercised jurisdiction over employment discrimination (J.A. 37-39). Cross-petitioners, therefore, urged the FPC to exercise its rule-making power with regard to employment practices of regulatees for the purpose of prohibiting employment discrimination based on race, sex or national origin.

The Federal Power Commission rejected cross-petitioners' rule-making request and concluded that it lacked delegated statutory authority to regulate discriminatory employment practices by its regulatees. It held that executive authority and constitutional considerations do not provide a basis for such jurisdiction. The Commission also could not find the necessary nexus between employment discrimination and the economic activities it was charged with regulating to justify exercising the jurisdiction requested by cross-petitioners. The FPC's decision distinguished employment discrimination from other subjects, such as national defense, antitrust, environmental considerations, navigation, flood control or recreation which it has considered in exercising its jurisdiction. The Commission found concern for these subjects to be "reflected" in the National Gas and Federal Power Acts (J.A. 61).

Finally, the Commission denied that its failure to regulate employment - a failure based on a claimed lack of statutory authority - constituted federal support for discrimination (J.A. 70). The Commission emphasized its support for the principle of nondiscrimination and pledged to recognize such a responsibility if it should be assigned to it.

From this ruling the cross-petitioners, NAACP et al., sought review before the United States Court of Appeals for the District of Columbia Circuit. This appeal was brought pursuant to and in conformity with Section 19 (b) of the Natural Gas Act, 15 USC § 717 (r) and Section 313 (b) of the Federal Power Act, 16 USC § 8251 (b). These sections provide for review of an order of the Federal Power Commission by any party to a proceeding aggrieved by the order issued.

The Court of Appeals gave a narrow interpretation to the "public interest" mandate of the FPC. It concluded "that Congress has not charged the Commission with advancing all public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electric and natural gas" (App. D, infra, p. 19). Accordingly, the court ruled that Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (App. D, infra, pp. 24-25). At the same time, the court recognized that there were circumstances in which the discriminatory practices of a regulatee were related to the FPC's proper objectives. The court explained its reasoning in these words (App. D, infra, pp. 25-26):

> The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs,

> we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proved that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

The court, however, did not require the Commission to adopt rules related to employment discrimination but left to the discretion of the Commission the question of whether such rules should be adopted.* Nor did the court resolve cross-

---

* The Court of Appeals expressed confusion over the cross-petitioners' purpose in attaching to their petition to the FPC a proposed rule. The petition submitted to the FPC, on page 1, requests "the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees."

Continued on next page

petitioners' claim that the Constitution required the FPC to preclude employment discrimination by its regulatees.

The Court of Appeals, in short, found the arguments of neither side wholly convincing and as a result vacated the Federal Power Commission's order of dismissal and remanded this case for further consideration in light of its opinion.

THE IMPORTANCE OF THE QUESTIONS PRESENTED

Although the Solicitor General of the United States has determined not to file a petition for certiorari in this case, he petitioned this Court on April 29, 1975, for an extension of time to allow the Federal Power Commission to prepare a petition on its behalf. In the event that the Federal Power Commission's petition should be granted, we believe there are a number of substantial questions in this case which should be reviewed.

Continued from preceding page

> This same intention is repeated in the prayer on page 3. The proposed rule was attached merely as suggestion of a possible form that would accomplish the general purpose of the petition. It was not the intention of those petitioning the FPC to limit their request for relief to the adoption of that particular proposed rule.

I. THE COURT OF APPEALS' NARROW READING OF THE FPC'S STATUTORY DUTY TO REGULATE IN THE PUBLIC INTEREST IMPROPERLY LIMITS THE AGENCY'S RESPONSIBILITY TO PREVENT EMPLOYMENT DISCRIMINATION BY ITS REGULATEES.

A. The Federal Power Commission Has Broad Power To Regulate In The Public Interest.

The statutory authority granted to the Federal Power Commission is broad-based. The Commission is charged with regulating the electrical energy and natural gas industries in light of the "public interest." This authority should be broadly construed to include significant national concerns such as a discrimination-free employment policy.

First, the pervasive regulatory scheme created by the Acts was designed to further and protect the public interest. The Federal Power Act, for example, declares the transmission and sale of electrical energy for distribution to the public to be a business strongly affected with the public interest. The Commission's duty in a licensing case is to explore all issues relevant to the public interest and determine whether the grant of a license is in that interest. Compliance with public policies of high priority and with legal requirements is relevant in determining what action is in the public interest.

The Natural Gas Act suggests a similarly broad regulatory power, based again on the public interest. In determining whether to grant a certificate of public convenience and necessity under the Act, the Commission is invested with discretion and must evaluate all factors bearing on the public interest. Such factors have been found to include matters of fundamental national policy, such as antitrust policy, national defense con-

cerns, and environmental impact. Since the elimination of discrimination in employment is a national policy of highest priority, an applicant's employment policies should be a matter relevant to the Commission's determination of the public interest.

Secondly, the FPC's authority to effectuate the "public interest" and "public convenience and necessity" has been broadly construed through judicial decision. In City of Lafayette, Louisiana v. Securities Exchange Commission, 454 F.2d 941, 951 (C.A. D.C. 1971), the Court of Appeals for the District of Columbia Circuit admonished the FPC to avoid employing "a tunnel vision of the public interest." On an earlier occasion, referring to the Federal Power Act and reminding the Commission that it was not restricted to dealing with "procedural minutiae," the same Court said:

> The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (C.A.D.C. 1967).

Thirdly, other administrative agencies, in carrying out their regulatory responsibilities, have been required to consider and promote national objectives beyond those expressly set forth in their statutes. Such a duty was found by this Court in Southern Steamship Company v. National Labor Relations Board, 316 U.S. 31, 47 (1942). In condemning a narrow approach to the exercise of regulatory power by the NLRB this Court found that:

> The [National Labor Relations] Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.

This principle also encompasses a duty on the part of administrative bodies to seek an accommodation between their immediate tasks and other statutory schemes.

A similarly broad interpretation of an administrative agency's responsibility was found by the Court of Appeals for the District of Columbia Circuit in Palisades Citizens Association Inc. v. CAB, 420 F.2d 188, 191 (C.A.D.C. 1969).

> No agency entrusted with determination of public convenience and necessity is an island. It fits within a national system of regulatory control of industry. Its decisions affect not only its primary interest groups but also the general public at large.

There are, therefore, numerous situations in which the courts have recognized that the mandate of administrative agencies to regulate in the public interest is sufficiently broad to encompass policies of overriding national concern. The elimination of employment discrimination in the United States is such a national policy. To permit the Federal Power Commission deliberately to exclude this policy from its regulatory considerations involves an improperly narrow interpretation of the public interest mandate.

B. The FPC And Other Federal Agencies Must Cooperate In The Implementation Of The National Employment Nondiscrimination Policy.

There is, in this country, a clearly articulated national policy against discrimination in employment on the basis of race, sex or national origin. The urgency and importance of this policy was made clear by the Congress in enacting Title VII of the Civil Rights Act of 1964, and the Equal Employment Opportunity Act of 1972, and has been affirmed by court decision and Executive Order.

The decision of the Court of Appeals in this case raises a significant federal question as to the obligation of federal administrative agencies, particularly the FPC, to recognize and support this overriding national policy in the exercise of their regulatory responsibility. The cross-petitioners urge a finding that the FPC, as an agency of the federal government engaged in the regulation of large industries, is required to assist in the enforcement of this national nondiscrimination policy.

The mere fact that Congress has established the Equal Employment Opportunity Commission and charged it with authority to effectuate the national nondiscrimination policy does not preempt other federal agencies from regulating discriminatory practices. On the contrary, it envisions a coordinated effort by all agencies of the Federal government. The EEOC has recognized that its role is not exclusive - for example, by its participation as amicus curiae in the court below where it agreed with cross-petitioners that the FPC had the broad jurisdiction for which we argue - and that other agencies must play a complementary role in eradicating employment discrimination. The courts also have recognized that combating employment discrimination is not a task restricted to one

Federal agency. In United Packinghouse, Food & Allied Workers International Union v. NLRB, 416 F.2d 1126 (C.A.D.C. 1969), cert. denied, 396 U.S. 903 (1969), for example, the Court of Appeals for the District of Columbia reviewed the legislative history of Title VII of the Civil Rights Act of 1964 and concluded that "[t]he [National Labor Relations] Board has concurrent jurisdiction with EEOC." And recently this Court observed that Title VII does not preclude other federal remedies against employment discrimination. See Johnson v. Railway Express Agency, 43 U.S.L.W. 4623, 4625 (1975).

We contend that the statutory charge of the FPC to regulate in the public interest is a broad authorization that includes a duty to proscribe discriminatory employment practices through the exercise of its rule-making capacity. As a federal agency, the FPC cannot ignore such important national policies and still satisfy its "public interest" mandate.

This question raised by cross-petitioners is one of profound significance in determining the scope of public interest regulation required of the FPC and similar administrative agencies.

The decision of the court below not only limits the "public interest" mandate of the FPC, but broadly implies that other agencies that are considering similar rules (the ICC, CAB, SEC) or that have adopted such rules (the FHLBB) may be similarly limited (App. D, infra, pp. 24-25). Moreover, without evidence of support of any kind, the court below casually concluded that the like-

lihood that discrimination in employment might affect equity in service "seems to us a slight one" (App. D, infra, p. 23).*

This unwarranted narrow reading of the statutory responsibilities of the Federal Power Commission and the implication that other regulatory agencies are similarly limited is likely to have a chilling effect on the Federal government's effort to secure equal job opportunity.

II. HAVING FOUND THAT THE FPC HAD JURISDICTION OVER EMPLOYMENT DISCRIMINATION FOR THE LIMITED PURPOSE OF PROTECTING CONSUMERS FROM ILLEGITIMATE COSTS, THE COURT BELOW ERRED IN REFUSING TO REQUIRE THE AGENCY TO ADOPT RULES TO EFFECTUATE ITS JURISDICTION.

The lower court rejected cross-petitioners' broad interpretation of the FPC's authority to regulate in the public interest. The court found, however, that in certain situations "consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, could be reasonably related to the pursuit of the Commission's proper objective." (App. D, infra, p. 25). Thus the Commission was found to have a narrow jurisdictional basis for the regulation of employment discrimination, an authorization that reached only to discrimination relating directly to the FPC's central regulatory purposes.

---

* The court sought to distinguish the situation of the Federal Communications Commission where discrimination in service "might be so subtle and unsusceptible of direct remedy as to require the eradication of its root cause" [employment discrimination] (App. D, infra, p. 23).

While recognizing that some regulation of employment discrimination was within the Commission's jurisdiction, the court stopped short of finding an obligation on its part to adopt specific rules governing such discrimination. The court declared that the Commission had considerable discretion "not to promulgate rules even when it has authority to do so" (App. D, infra, p. 33, n. 53). Cross-petitioners argue that once jurisdiction over discrimination is determined to exist, even though the scope is limited, there must be found a duty to act affirmatively to prevent such discrimination. In finding only a discretionary authority as to rule-making the court below was in error.

Discrimination in employment has a fundamental impact on the efficient and proper functioning of the industries over which the FPC is granted specific regulatory authority. A direct nexus exists between the cost of practicing employment discrimination (e.g. a burden on interstate commerce, inadequacy of service, higher prices) and the Commission's statutory duty to see that no illegitimate costs are passed on to consumers. As the lower court recognized, it is the Commission's purpose "to insure the efficient performance of an industry in which the normal forces of competition are for one reason or another not equal to the task" (App. D, infra, pp. 16-17).

When widespread employment discrimination is allowed to exist, as it does in the gas and electric utility industries, the Commission cannot ignore its impact on the public's interest in efficiency and proper functioning. The court below recognized at least one aspect of the problem, the unnecessary and illegitimate costs of such discrimination, but it stopped short of providing an effective remedy. This treatment is inadequate to satisfy the Commission's statutory mandate.

The lower court was incorrect in its characterization of the Commission's rulemaking authority as discretionary. The Commission may indeed have discretion in determining what kind of rule to fashion. But cross-petitioners contend the establishment of rules governing discriminatory employment practices must be declared an obligation of the Federal Power Commission.

Lacking a rule of general applicability, aggrieved parties will be reduced to a case by case determination whenever appropriate rule-making or renewal proceedings arise - a process that may take many years. This would be feeble and inadequate relief for a serious wrong, especially in light of the Commission's persistent refusal to recognize the important national policy of nondiscrimination in employment and its resistance to implementing that policy even to the limited extent required by the court below.

III. THE LOWER COURT FAILED TO RECOGNIZE THE FPC'S CONSTITUTIONAL DUTY TO PREVENT EMPLOYMENT DISCRIMINATION BY ITS REGULATEES.

There is an additional ground for finding a duty on the part of the FPC to regulate racially discriminatory practices, an obligation that is based on the Fifth Amendment to the Constitution. In an industry where the government works closely to support, regulate and protect the private sector, any effort short of affirmative regulation results in the government condoning the illegal discrimination of the regulatee.

The Federal Power Commission rejected cross-petitioners' argument that such regulation is constitutionally required. The Commission denied that the government was involved with the regulated companies to a degree that constituted state action and gave rise to constitutional obligations.

The lower court failed to address itself to this issue with any certainty. The court found only that the FPC was not obligated to adopt the particular rule suggested by the cross-petitioners. No determination was made as to a duty to adopt a general anti-discrimination rule. The court did not express a finding, simply a doubt that the Commission has a Constitutional obligation to impose nondiscrimination requirements on its regulatees.

The opinion below is a narrow reading of the Fourteenth Amendment which not only forbids racial discrimination by a state, but also forbids state support of or participation in ostensibly private racial discrimination through "any agreement, management, funds or property." Cooper v. Aaron, 358 U.S. 1, 19 (1958). The Fifth Amendment due process clause imposes an equivalent prohibition on the Federal government. Bolling v. Sharpe, 347 U.S. 497 (1954). As a result federal administrative agencies are prohibited both from discriminating on the basis of race and from sanctioning or supporting such discrimination.

The precise Constitutional question in this case is whether the Federal Power Commission, as a government agency, has violated its responsibilities under the Fifth Amendment by not requiring the industry over which it exercises farreaching regulatory control to follow nondiscriminatory employment practices. The issue is not whether the government involvement in the activities of the private companies is sufficient to constitute state action and thus place Constitutional responsibilities on otherwise private entities. Cf. Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974); Jackson v. Statler Foundation, 496 F.2d 623 (C.A. 2, 1974). These two issues are distinct and the requirement of each considerably different. "A holding that an otherwise private institution has become an arm of the state is much

broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination," (Friendly, J., dissenting in Jackson v. Statler Foundation, supra at 637).

In Green v. Kennedy, 309 F. Supp. 1127 (D.D. C. 1970), affirmed sub nom., Coit v. Green, 404 U.S. 797 (1971), for example, the court prohibited the Treasury Department from affording tax benefits to private segregated schools. See also McGlotten v. Connally, 388 F. Supp. 448, 457 (D.D.C. 1972). This raised a very different issue from whether those schools could be sued successfully to require that they desegregate. Similarly, in Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967), the State was precluded from contracting with contractors from whose labor forces blacks were barred. It is unlikely, however, that those contractors could have been proceeded against directly on the grounds that they were engaged in "state action." The obligation of the government itself to avoid constitutional violations is much stricter than that imposed on "private" entities. See, e.g., Lombard v. State of Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); Turner v. City of Memphis, 369 U.S. 350 (1962); McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 (1914); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D.C. Conn. 1974). In short, whether or not a particular gas or electric company is involved in "state action" is not the same question as whether governmental agencies are impermissibly and unconstitutionally fostering private discrimination. To show the former one must satify the complex requirements of the "state action" test. The latter requires a lesser showing of government action sufficient to encourage or support the private acts of racial discrimination.

And it cannot be too strongly emphasized that this case involves racial and sexual discrimination in violation of the equal protection guarantees of the Constitution - not an alleged denial of due process of law. Cf. Jackson v. Metropolitan Edison Co., supra. This Court has noted the distinction between these two constitutional protections. "The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phases." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). In cases involving racial discrimination this Court has been even more strict in applying the Constitution's equal protection measure. The Fourteenth Amendment (and for the Federal government the Fifth Amendment) was "unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." Oregon v. Mitchell, 400 U.S. 112, 127 (1970).

The FPC is not casually concerned with the activities of the gas and electric utility industry; it is deeply involved in every aspect of its operations. It must approve many of the most important business decisions these companies make. The setting of rates, transport and sale of energy, construction of facilities, mergers and the issuance of securities all must be agreed to by the Commission. The issuance of licenses requires the FPC's approval.

The granting of monopoly status to the utility companies is further evidence of the involvement of the government in the gas and electric utility industry. This exclusivity of operation is designed to protect utilities from destructive competition and is accomplished with government support. Because this industry is so vital, the government, through the FPC, guarantees its successful operation.

The Federal Power Commission, in numerous ways, sanctions and supports the conduct of the utility industry. As a result the Commission cannot ignore the racially discriminatory employment practices in that industry and still satisfy its constitutional obligations. Cross-petitioners argue that the Fifth Amendment requires the FPC to exercise its rule-making power. It may do so in any appropriate manner, as long as the result prohibits racially discriminatory employment practices.

The Commission's record of indifference to these illegal practices, when viewed in the context of its massive regulation and support of the industry, is a clear constitutional violation. The Federal Power Commission is constitutionally required to act affirmatively to terminate its support of racial discrimination. The court below was incorrect in failing to recognize such a constitutional obligation on the part of the FPC.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari, this cross-petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

Howard A. Glickstein
Notre Dame Center for
Civil Rights
Notre Dame, Indiana 46556

William L. Taylor
Catholic University Law
School
Washington, D.C. 20064

CERTIFICATE OF SERVICE

It is hereby certified that in compliance with Rules 33(1) and 33(2)(a) of this Court, three copies each of this Cross-Petition for a Writ of Certiorari have been forwarded by depositing same in a United States mail box, first class postage prepaid, to the following:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Drexel D. Journey
General Counsel
Federal Power Commission
825 No. Capitol Street
Washington, D.C. 20426

/s/ Howard A. Glickstein
Howard A. Glickstein
Counsel for Cross-
Petitioners

APPENDIX A

RELEVANT SECTIONS OF THE

FEDERAL POWER ACT AND

NATURAL GAS ACT

FEDERAL POWER ACT

SEC. 4. [*As amended August 26, 1935.*] The Commission is hereby authorized and empowered—

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affect-

ing navigation have been approved by the Chief of Engineers and the Secretary of the Army.[9] Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. [41 Stat. 1065–1066; 49 Stat. 840–841; 61 Stat. 501; 16 U.S.C. 797(e)]

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to

be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851–852; 16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be

increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824d(e)]

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e(a)]

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852: 16 U.S.C. 824e(b)]

SEC. 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may pre-

scribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [49 Stat. 858–859; 16 U.S.C. 825h]

NATURAL GAS ACT

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U. S. C. § 717 (a)]

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and

regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect;[15] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or

service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U. S. C. § 717d]

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f (a)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

APPENDIX B

OPINION OF THE

FEDERAL POWER COMMISSION

(No. 623, July 11, 1972)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

EMPLOYMENT PRACTICES

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr.,
Pinkney Walker,
and Rush Moody, Jr.

The National Association for the Advancement of Colored People et al.	)	Docket No. R-447

OPINION NO. 623
DECLARATORY OPINION AND ORDER ON PETITION FOR
ISSUANCE OF A RULE RELATIVE TO
EMPLOYMENT PRACTICES

(Issued July 11, 1972)

The petition to which this Opinion is addressed was filed June 22, 1972, and is treated herein as a petition for a declaratory order. See 1.7(c) Federal Power Commission Rules of Practice and Procedure, 18 CFR 1.7(c).

Petitioners raise important issues of policy and law which should be considered through judicial interpretation of regulatory statutes and laws and regulations governing employment practices and equal opportunities. This subject matter has been considered previously by the Commission as it affects statutory provisions which the Federal Power Commission administers. Those Commission determinations have not been challenged on appeal, even though one or more petitioners herein were parties.

Three docketed cases 1/ have arisen under the Federal Power Act, 16 U.S.C. 791(a) et seq., in which a number of underlying legal issues raised in the subject petition were considered. They were resolved by the Commission in a manner consistent with the views set forth in this Opinion and Order. They were presented in arguments raised by certain of the petitioners now before the Commission.

The Commission lacks the legal authority to promulgate equal employment opportunity regulations covering employment practices of those systems which it regulates as natural gas companies, public utilities or licensees, because it lacks the requisite delegation of Congressional authority to act in that area. Executive authority and constitutional considerations do not provide the basis for Commission jurisdiction. Simply stated, the

---

1/ Pacific Gas and Electric Company, 44 FPC 1365, 1373 (1970), appeals dropped, unreported orders of the Court of Appeals for the Ninth Circuit filed April 26, 1971, and June 22, 1971, Pacific Gas and Electric Company v. Federal Power Commission, Nos. 71-1027, 71-1028, 71-1453 and 71-1454; and Virginia Electric and Power Company, ___ FPC ___, order issued August 5, 1971, not appealed.

Commision is not the designated agency for the administration of equal employment laws or any other type of labor regulation. As pointed out infra, regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies.

Where the Commission does have specific responsibilities in the area of equal rights, they are being enforced. These are: (1) as an employer and agency of the Federal Government subject to the requirements of Executive Order No. 11478, August 8, 1969, 34 F.R. 12985; and (2) as the Congressionally delegated agency charged by the Congress with the duty to administer the comprehensive use of resources standard governing hydroelectric licensing under the Federal Power Act, 16 U.S.C. 803(a), i.e., in a manner to insure that multi-purpose hydroelectric facilities (e.g., power production, navigation, recreation and other uses), are open to use by all persons upon nondiscriminatory bases. Implementing regulations of the Commission are set forth in Federal Power Commission Administrative Order No. 131, Equal Employment Opportunity, issued January 26, 1970, Administrative Manual; and Federal Power Commission Order No. 341 Amending Regulations Under the Federal Power Act, Prohibition of Discrimination at Recreational Facilities at Licensed Hydroelectric Projects, issued April 19, 1967, 37 FPC 775 2/.

The Commission is mindful and fully supportive of the National policies of this Nation directed at the elimination of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin. The Commission welcomes judicial review and final resolution of the findings and conclusions set forth in this Opinion.

2/ Codified Part 8 Commission Regulations under the Federal Power Act, 18 CFR Part 8.

BEST COPY AVAILABLE

Requested Relief -- Petitioners seek a general rulemaking action of the Commission directed to the promulgation of "* * * regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees * * *." Petition, p. 3. Procedurally, petitioners seek public hearings before the Commission, oral argument and a general public rulemaking through notice of a rule 3/ and written responses thereto. We deny that request because of the basic conclusions which the Commission has reached relative to the scope of its regulatory authority. As the Commission stated in Pacific Gas and Electric, supra, 44 FPC 1368:

> The legal issues, which must be of concern to us in this proceeding, are those over which we have jurisdiction. We do not find the issues raised * * * sufficiently related to a legitimate regulatory purpose as expressed in the Federal Power Act that we can proceed as requested * * * we do not find it appropriate in the exercise of our general administrative power to order a hearing on ultimate issues which we could not lawfully resolve.

The bases of the Commission's jurisdiction to act in respect to natural gas companies, public utilities and licensees, are statutory: namely, the Federal Power Act, 16 U.S.C. 791(a) et seq., passed in 1920 as the Federal Water Power Act, 41 Stat. 1063, and substantially amended in 1935, 49 Stat. 838; and the Natural Gas Act, 15 U.S.C. 717 et seq., passed in 1938. Other statutes cited

---

3/ A proposed rule annexed to the petition is reproduced in Appendix A hereto.

by petitioners in support of their claims do not grant jurisdictional authority to this Commission. In our judgment, the Congress has not granted authority under any of these statutes for this agency to act as a remedial forum for the redress of unlawful employment practices.

Discussion of Authorities -- Petitioners legal arguments are directed to various sections of the Natural Gas Act, the Federal Power Act, the Civil Rights Act of 1964, as amended, 78 Stat. 241, 42 U.S. 1971 et seq., the Civil Rights Act of 1866, 14 Stat. 27, the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), Executive Order Nos. 11246 and 11375, the Fifth Amendment to the United States Constitution and the Fair Employment Practices Act of various states. We consider these seriatim.

Referring to the Natural Gas Act and natural gas companies, petitioners cite sections dealing with the Congressional grant of jurisdiction to the Commission to regulate interstate transportation and sale of natural gas for resale in interstate commerce in the public interest, 15 U.S.C. 717(a); the certification of such transactions and facilities therefor of natural gas companies and abandonment thereof as required by the public convenience and necessity, 15 U.S.C. 717f(b)(c); the control of the types of wholesale gas services of natural gas companies and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 15 U.S.C. 717c(b), d; and general administrative procedural authority of the Commission, 15 U.S.C. 717o.

Referring to the Federal Power Act and public utilities and licensees, petitioners cite sections dealing with the Congressional grant of jurisdiction to regulate interstate transmission and sale of electric energy for resale in interstate commerce in the public interest, 16 U.S.C. 824(a); the control of the merger, sale or disposition of jurisdictional properties of public utilities or acquisi-

tion of the capital securities thereof as required in the public interest, 16 U.S.C. 824b(a)(b); the control of the types of wholesale or bulk power services of pubic utilities and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 16 U.S.C. 824d(b), e; the licensing of hydroelectric project works of licensees upon streams over which the Congress has jurisdiction, upon public lands and reservations of the United States and at federally owned dams, 16 U.S.C. 797(e); and the general administrative procedural authority of the Commission, 16 U.S.C. 825h.

Essentially, petitioners argue that public interest considerations enfold the national policies against discrimination in employment and therefore make their implementation and execution a part of this Commission's regulatory jurisdiction and authority. We can not accept this generalized argument. Application of the public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of that Act. As pointed out infra, the purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify the ultimate conclusion petitioners draw. We distinguish employment procedures from other subjects such as national defense considerations, antitrust, environmental requirements, navigation, flood control or recreation, all of which are reflected in the Natural Gas and Federal Power Acts. See for example, 15 U.S.C. 717j, 717s(a); and 16 U.S.C. 803(a)(h), 804, 805, 809, 824a(a) and 825j.

Nothing in either of the basic statutes which we administer — the Federal Power Act and the Natural Gas Act -- and particularly the sections referenced by petitioners, addresses the matter of employment procedures of natural gas companies, public utilities or licensees, nor does the legislative history of either Act give any basis for believing that Congress intended to confer jurisdiction upon the Commission to regulate those activities. Both statutes are economic regulatory devices born out of economic development and financial conditions which prevailed nationally earlier in this century. The Federal Water Power Act (Part I of the Federal Power Act), is, as its preamble states, "* * * An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto * * * and for other purposes.", 41 Stat. 1063. The Federal Power Act is Title II of the Public Utility Act of 1935, 49 Stat. 838, "An Act To provide for control and regulation of public utility holding companies, and for other purposes.", 49 Stat. 803. The Natural Gas Act, as its preamble states, is "An Act To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.", 52 Stat. 821.

Constitutional considerations and the inability of individual states to regulate and control multistate utility operations, i.e., interstate transmissions and wholesale transactions involving electric energy and natural gas were principal factors in the enactment of the Federal Power and Natural Gas Acts. Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927); Federal Power Commission, et al. v. Natural Gas Pipeline Co., et al., 315 U.S. 575, 581-83 (1942); Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 525-531 (1945); and Federal Power Commission v. Southern California Edison Company, et al. 376 U.S. 205, 213-14 (1964). In short,

Congress, through the enactment of these statutes, provided Federal regulation of electric and natural gas services and transactions which are beyond the reach of state public service commission control. See for example, House Report No. 61, on H.R. 3184 (which became the Federal Water Power Act), 66th Cong., 1st Sess., p. 5; Senate Report No. 621, on S. 2796 (which became the Federal Power Act), 74th Cong., 1st Sess., pp. 3, 17-18, 22; and House Report No. 709 on H.R. 6586 (which became the Natural Gas Act), 75th Cong., 1st Sess., pp. 1-3.

The consumer and services and prices for electric and gas utility services were focal points of Congressional concern in the enactment of both statutes. See Pennsylvania Water & Power Co. et al. v. Federal Power Commission et al., 343 U.S. 414, 418 (1952) "A major purpose of the whole Act is to protect power consumers against excessive prices * * *."; Atlantic Refining Co., et al., v. Public Service Company of New York, et al., 360 U.S. 378, 388 (1959), "the /Natural Gas/ Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."; and Federal Power Commission v. Transcontinental Gas Pipe Line Corp., et al., 365 U.S. 1, 19 (1961) "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies'."

It is in the context of these considerations that we reject petitioners' broad public interest arguments. The public interest concept does not provide the basis for this Commission to regulate employment procedures of natural gas companies, public utilities or licensees, any more than the public interest would have us regulate the securities, the taxes, the patents, the safety, the wages and hours, the advertising or any other of a number of areas which Congress has created specialized agencies to regulate, including equal employ-

ment opportunities. The Natural Gas and Federal Power Acts do not admit of such interpretation.

Congress has acted in the area of labor law and equal employment opportunity protection. See, for example, 29 U.S.C. Chapters 1-15, and in particular, Chapter 2. Women's Bureau, Chapter 4B. Federal Employment Service, Chapter 5. Labor Disputes, Mediation and Injunctive Relief, Chapter 6. Jurisdiction of Courts in Matters Affecting Employer and Employee, Chapter 7. Labor-Management Relations, Chapter 8. Fair Labor Standards, Chapter 9. Portal to Portal Pay, Chapter 11. Labor-Management Reporting and Disclosure Procedure, Chapter 12. Department of Labor, Chapter 14. Age Discrimination in Employment, and Chapter 15, Occupational Safety and Health; the Civil Rights Act of 1964, 78 Stat. 241; the Equal Pay Act of 1963, 77 Stat. 56; and the Equal Employment Opportunity Act of 1972, 86 Stat. 103 4/. In no instance did the Congress specify administrative duties for this Commission in these areas.

4/ Cf. the Civil Rights Act of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 42 U.S.C. 1981-1982, Equal rights under the law, Property rights of citizens.

§1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

BEST COPY AVAILABLE

The basic statute of concern in light of petitioners' arguments, is the Civil Rights Act of 1964, as amended, including the Equal Employment Opportunity Act of 1972. As pointed out in the Opinion of the Supreme Court, Griggs, et al. v. Duke Power Company, 401 U.S. 424, 429-31 (1971), "The objective of Congress in the enactment of Title VII /Civil Rights Act of 1964/ * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification." Title VII of that Act, 78 Stat. 253, 42 U.S.C. 2000e, establishes the Equal Employment Opportunity Commission to administer those provisions. That Act specifies the actions which constitute unlawful employment practices, 42 U.S.C. 2000e-2, -3 5/. Investigatory authority is conferred upon the EEOC, including examination of witnesses and production of evidence with provision for judicial en-

---

5/ Among the proscribed conduct are "* * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * * or * * * to limit, segregate, or classify * * * to deprive any individual of employment opportunities or otherwise adversely affect * * * status as an employee, because of such individual's race, color, religion, sex, or national origin", 42 U.S.C. 2000e-2(a)(1)(2).

forcement of investigatory determinations, 42 U.S.C. 2000e-5, -8, -9. The EEOC may prescribe procedural regulations pursuant to the requirement of the Administrative Procedure Act, 42 U.S.C. 2000e-12. It may direct the keeping of records relevant to employment practices and enforcement of the Civil Rights Act, subject to he statutory provision that information so obtained by the EEOC shall not be made public by it prior to the initiation of any proceeding involving such information, 42 U.S.C. 2000e-8. Its investigation of claimed violations of Title VII, by statute, are not public without the written consent of the parties and may not be used as evidence in any subsequent proceeding, 42 U.S.C. 2000e-5(a). The Act provides for mediation and conciliation measures leading to voluntary compliance measures by the EEOC, 42 U.S.C. 2000e-5(a). Private persons aggrieved have recourse to the courts with injunctive and equitable remedies, together with court appointed counsel, 42 U.S.C. 2000e-5(e). The Act also provides for civil enforcement actions by the Attorney General, 42 U.S.C. 2000e-6, -5(e).

Pursuant to the 1972 amendments, the coverage of Title VII provisions are extended to certain state and local government authorities and private employers with 15 or more persons and private and public educational institutions, 86 Stat. 103, 42 U.S.C. 2000e.

The power of the EEOC is extended "* * * to prevent any person from engaging in any [equal opportunity] unlawful employment practices * * *", 86 Stat. 104, 42 U.S.C. 2000e-5. The EEOC is required to serve notice of charges, which, by statute, are not to be made public by the Commission; to investigate the same, according "* * * substantial weight to final findings and orders made by state or local authorities in proceedings commenced under state or local law * * *"; and to endeavor to mediate or conciliate controversies which have reasonable cause, or otherwise to dismiss the charge.

The EEOC is to defer, initially, to state or local agencies having jurisdiction in the premises under an exhaustion of remedies principle. Where the EEOC is unable to mediate or conciliate, it may bring a civil action in the Federal courts in pursuit of equitable remedies or affirmative relief. Where the respondent party is a governmental authority, the Act provides for initiation of such court actions by the Attorney General. The EEOC and the Attorney General are also authorized to seek temporary judicial relief. The party aggrieved may also initiate court action under certain conditions, may seek court appointed counsel and may intervene in actions instituted by the EEOC or the Attorney General. The Equal Employment Opportunity Act of 1972 provides for transfer of these functions of the Attorney General to the EEOC effective in 1974.

The 1972 amendments confer upon the EEOC, in connection with its hearings and investigations, the powers of National Labor Relations Act, 29 U.S.C. 161, 86 Stat. 109, 42 U.S.C. 2000e-9. The type of investigatory rulemaking which petitioners seek before this Commission is within the authority of the EEOC to effectuate. Indeed, that agency's established reporting requirements appear to comprehend essentially the type of infomation which petitioners seek to assemble through this agency. The amendments provide for a Presidentially appointed general counsel of the EEOC with the "* * * responsibility for the conduct of litigation as provided in Sections 706 and 707 /42 U.S.C. 2000e-5, -6/ of this title.", 86 Stat. 110, 42 U.S.C. 2000e-4. In the enactment of the 1972 revisions to the Civil Rights Act of 1964, the Congress considered and rejected a provision whereby recognized remedies for enforcement of equal rights and labor practices would be pre-empted. See, United States Code Congressional and Administrative News, 92nd Cong., 2nd Sess., No. 3, pp. 1049-50, 1022, 1043-44. Congress clearly evidenced its intention re-

garding the enforcement of equal rights, including its intention in respect to administrative actions dealing with equal employment opportunities. The Civil Rights Act, as amended, does not specify that all departments and agencies are to undertake the administration or implementation thereof. When the Congress wishes to accomplish that result, it so states. See, National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4332, 4333.

The 1972 amendments establish an Equal Employment Opportunity Coordinating Council with "* * * responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. * * *", 86 Stat. 111. The Council is comprised of the Attorney General, Secretary of Labor, and the Chairmen of the EEOC, the United States Civil Service Commission and the United States Civil Rights Commission.

The Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), cited by petitioners, is a part of the Fair Labor Standards Act of 1938, enforced by the Wage and Hour and Public Contracts Division of the Labor Department, not the Federal Power Commission. That Act's provisions are directed to wage differentials based upon sex. As such, the coverage of this Act is more restrictive than the Civil Rights Act's prohibition of discrimination based upon sex, the latter extending to areas other than wage discrimination. Criminal and civil actions may ensue in enforcement of the Fair Labor Standards Act.

Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, as amended by Executive Order No. 11375, October 13, 1967, 32 F.R. 14303, implements the "* * * program of equal employment opportunity in Government employment, employment by Federal contractors and sub-contractors and employment under federally assisted construction contracts * * *", regardless of sex, race, creed, color, or national origin, 3 CFR 685. As recognized in these orders, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, enunciates the national policy of equal opportunity in private employment, and Title VI, 78 Stat. 252, is specifically directed to non-discrimination in federally financially assisted programs. The Secretary of Labor is the designated administering official of Parts II and III of Executive Order No. 11246, which relate to Government contractors, sub-contractors, and federally assisted programs. Executive Order No. 11247, September 24, 1965, 30 F.R. 12327, assigns coordinating function responsibilities to the Attorney General in respect to Title VI matters. The Secretary of Labor, by Order No. 15-68, August 8, 1968, 33 F.R. 12600, assigned the responsibility under Executive Order No. 11246, to the Office of Federal Contract Compliance 6/.

6/ Order No. 15-68 states in part (33 F.R. 12600-1):

> Under the general direction of the Secretary * * * the Office of Federal Contract Compliance (EEO) is hereby delegated authority and assigned responsibility for: * * * Carrying out * * * Parts II, III, IV of Executive Order No. 11246 as amended by Executive Order No. 11375 * * * Developing and recommending to the Secretary rules and regulations necessary or appropriate to achieve the purposes of * * * 11246 * * * 11375 * * * Coordinating with the Equal Employment Opportunity Commission and the Department of Justice on matters relating to Title VII * * * and maintaining liasion with other agencies having civil rights and equal employment opportunity activities * * *.

Order No. 1, issued October 24, 1969, by the Office of Federal Contract Compliance re-delegates certain of its responsibilities to 16 departments or agencies, each with designated compliance responsibility relative to equal employment opportunity 7/. Order No. 1 states in part:

"2. Action. - a. The agencies listed herein below are designated as compliance agencies. Other agencies, not so listed, are hereby relieved of any compliance responsibilities under the Executive Order /11246/.", Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4380. The Office of Federal Contract Compliance and the Equal Employment Opportunity Commission, on May 20, 1970, 35 F.R. 8461, entered into a Memorandum of Understanding "* * * to reduce duplication of compliance activities and to facilitate information exchange * * *."

7/ The departments and agencies are: Agency For International Development, Department of Agriculture, United States Atomic Energy Commission, Department of Commerce, Department of Defense, General Services Administration (whose industries include electric, gas and sanitary services, holding and investment companies), Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of the Interior (whose industries include mining and oil, petroleum, refining and related industries and pipeline transportation), National Aeronautical and Space Administration, Post Office Department, Department of Transportation, Tennessee Valley Authority, Department of the Treasury, Veterans Administration and the Environmental Protection Agency.

The Office of Federal Contract Compliance Implementing Rules and Regulations Under Executive Order 11246, are set forth in Title 41, Code of Federal Regulations, Chapter 60, Part 60-1, Obligations of contractors and sub-contractors, Part 60-2, Affirmative action programs, Part 60-3, Employee testing and other selection procedures, Part 60-5, Washington plan, Part 60-6, San Francisco Plan, Part 60-7, St. Louis plan, Part 60-8, Atlanta plan, and Part 60-20, Sex discrimination guidelines 8/. The Implementing Rules and Regulations of the Equal Employment Opportunity Commission are set forth in Title 29, Code of Federal Regulations, Chapter XIV, Part 1600, Employee responsibilities and conduct, Part 1601, Procedural regulations, Part 1602, Records and Reports, Part 1604, Guidelines on Discrimination because of sex, Part 1605, Guidelines on Discrimination because of religion, Part 1606, Guidelines on Discrimination because of national origin, Part 1607, Guidelines on Employee selection procedures, and Part 1610, Availability of Records 9/.

8/ Office of Federal Contract Compliance Order No. 14, issued January 14, 1972, sets forth proposed new procedures to standardize compliance reviews of employment in Federal contract areas. Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4345.

9/ See also, Regulations of the Department of the Interior and of the General Services Administration, pursuant to their assigned responsibilities under Title VI of the Civil Rights Act of 1964 (Interior), 43 CFR Parts 17 and 17a, and (GSA), 41 CFR Subpart 101-6.2. Accommodations between Federal Labor and Civil Rights laws are discussed in Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 5063.

The foregoing matters we believe, effectively demonstrate why this Commission does not have the responsibilities pursuant to Executive Order Nos. 11246 and 11375, as alleged by petitioners.

Petitioners also cite the Fifth Amendment to the Constitution in support of their claims. We find nothing in the Constitution or the judicial interpretations thereof, as would support Commission regulation of utility employment practices. That which the Constitution does require, this Commission is now doing. No governmental action which this agency takes denies any person of equal protection of the laws. See Moose Lodge No. 107 v. Irvis, et al., ___ U.S. ___, decided June 12, 1972, Slip Op. pp. 8-9, which discusses constitutional protections in the context of the Fourteenth Amendment:

> In 1883, this Court in The Civil Rights Cases, 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," Shelley v. Kraemer, 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in Shelley v. Kraemer, supra, and in Burton v. Wilmington Parking Authority, 365, U.S. 715 (1951).

While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true

significance." Burton v. Wilmington Parking Authority, supra, at 772.

> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. Shelley v. Kraemer, supra.

This Commission, as pointed in Pacific Gas and Electric, supra, 44 FPC 1367-8, does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates, based upon race, sex, color, creed or national origin; does not permit its hydroelectric licensees owning or operating multiple purpose reservoirs to discriminate in the use thereof, based upon race, sex, color, creed or national origin; and has affirmatively spoken out in respect to the need for all utility suppliers to fully implement the Nation's policy respecting elimination of discrimination in employment. Thus, where this agency takes "State action" within the meaning of Constitutional considerations, its processes do not deny equal protection of the laws either by reason of any Commission rule, regulation or order or by reason of enforcement of a private discriminatory action.

Petitioners' references to actions of the Federal Communications Commission and the Public Service Commission of the District of Columbia, are not persuasive in the interpretation of the provisions of Federal Power and Natural Gas Acts. Both are legally distinguishable. The Federal Communications Commission, the one Federal administrative utility regulatory body which has promulgated regulations in the area of equal employment practices of its regulatees of the general type petitioners seek, did so following judicial interpretation of one of the basic statutes which it administers, the Communications Act of 1934, 47 U.S.C.

151 et seq., Office of Communication of the United Church of Christ, et al. v. F.C.C., et al., 359 F.2d 994, 1003, 1006 (CADC, 1966) 10/. The Court recognized two basic concepts of that Act with a nexus to employment practices, the "fairness

---

10/ As petitioners note, the Interstate Commerce Commission initiated a rulemaking inquiry on May 6, 1971, to consider whether there is discrimination in carriers' employment practices, whether laws are being violated, whether that Commission has jurisdiction to deal with the matter, and what action the Commission should take if it has jurisdiction, Notice of Proposed Rulemaking, Ex-Parte No. 278, 36 F.R. 10741. The Securities and Exchange Commission, by Release Nos. 5170 and 9252, July 19, 1971, called attention to disclosure requirements in SEC forms as to civil rights legal actions affecting the security registrant's business activities, such as loss of government contracts or civil rights enforcement activities. The Federal Home Loan Bank Board Regulation referred to by petitioners, April 21, 1972, 37 F.R. 8436, in an exercise of responsibility which that agency has by reason of inter alia, Title VIII, Fair Housing, Public Law 90-284, 82 Stat. 73, 81.

doctrine" and the "public reaction to programming test" 11/, neither of which are reflected in the

---

11/ Both tie to program content of mass communication media and relate to the bases upon which the FCC assesses the public performance of media facility owners under its licensing procedures, that in contradistinction to direct governmental control of programming. See Memorandum Opinion and Order and Notice of Proposed Rulemaking of the Federal Communications Commission released July 5, 1968, the initial order of that Commission in a series of actions, 33 F.R. 9960, 9961-2, which states in part:

> 9. * * * there is the consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together — the national policy against discrimination and the nature of broadcasting — we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination — of violating the national policy. In this respect — a mass media service to the public which is based entirely on a Federal license under a public interest standard — the situation clearly parallels the Federal policy in contract awards.

Footnote continued on next page

Natural Gas or Federal Power Acts. The Communications Commission, by orders released March 29, 1972, 37 F.R. 6586, February 12, 1971, 36 F.R. 3119, August 11, 1970, 35 F.R. 12892, and June 3, 1970, 35 F.R. 8825, adopted reporting regulations requiring cable television operators, communications common carriers and broadcast licensees or permittees to affirmatively show non-discrimination plans in employment practices and to complete annual reporting thereon. Through Notice of Proposed Rulemaking released June 28, 1971, that Commission initiated inquiry into proposed regulations relative to discrimination based upon sex as a part of that Commission's administrative law, 36 F.R. 12542. A rule was adopted and released on December 21, 1971, 36 F.R. 25012.

11/ Footnote continued from preceding page

> 11. The same question is raised when a substantial charge is made that a licensee is deliberately discriminatory in his employment policies. A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts.

The action of the District of Columbia Public Service Commission in respect to equal opportunity employment practices of its regulatees, Re Potomac Electric Power Company, 83 PUR 3d 113, 147-8, 152-8 (1970), 84 PUR 3d 236, 246 (1970), rests upon specific authority in that Commission. This includes statutory provisions governing that agency, 43 DC Code 303, general federal law, Civil Rights Act of 1964, Executive Order No. 11246 and general police regulation, District of Columbia Commissioners Order No. 65-768 12/. That Commission is currently considering this subject in relation to the Potomac Electric Power Company. See, PSC-DC, Formal Case No. 576, In the Matter of Investigation of Employment Practices of the Potomac Electric Power Company.

Recent cases before the California Public Utilities Commission have established that the PUC does not have jurisdiction over such employment practices of regulated entities, NAACP et al. v. All Regulated Public Utilities et al., Cal. P.U.C. Decision No. 77781, dated October 6, 1970, petition for writ of review denied the state Supreme Court

---

12/ 43 DC Code 303 states: "The Commission shall have power * * * to require and compel every public utility to comply with * * * all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility." DC Commissioners Order No. 65-768 (D.C. Police Regulations, Article 47, Section 4), is a general police regulation prohibiting employment discrimination based upon race, color, religion, national origin or sex.

unreported order, April 29, 1971; and Re Pacific Gas & Electric Company, 87 PUR 3d 270, 312 (1971). In substance, the California Commission found minority hiring practices to be a matter not within the scope of the state utility laws, but, rather, under the State Fair Employment Practices Act.

Petitioners refer to various state fair employment practice laws. We do not find regulatory jurisdiction in this Commission based upon those provisions. Moreover, as noted, supra, even the Equal Employment Opportunity Commission must defer to state agencies having jurisdiction in this area under an exhaustion of remedies principle.

We wish to make clear that should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforcement thereof as a matter of highest priority. We indicated in Pacific Gas and Electric Company, supra, 44 FPC 1368, our full commitment to "* * * the national policy that discrimination in employment is to be eliminated by all elements of our society, public and private. * * *".

Limitations of the Proposed Rule — As will be apparent from an examination of the rule as proposed by petitioners, the processing of any complaints thereunder before an agency such as this Commission, which must observe the requiremnts of the Administrative Procedure Act and general public disclosure procedures, 5 U.S.C. 551 et seq., would inevitably do violence to the non-public disclosure principles of the Civil Rights Act, 86 Stat. 104, 42 U.S.C. 2000e-5(a), 78 Stat. 264, 42 U.S.C. 2000e-8(e). Complaints of discrimination under Section 9 of the proposed rule, or Section 10 intervenor actions, would be public information under this agency's procedures, 18 CFR 1.36(c). Charges of discrimination are not public under the Civil Rights Act, 86 Stat. 104. Similarly, a gener-

al public disclosure of annual employment reporting data (EEO-1), pursuant to Section 6 of the proposed rule, would appear to transcend the non-disclosure principle of the Civil Rights Act, 78 Stat. 264

Additionally, the proposed rule transcends basic legal requirements of the Federal Power and Natural Gas Acts. The statutory bases upon which this Commission must judge particular applications are set forth in the two Acts. Section 11 of the proposed rule would have that judgment accomplished basically in accordance with standards of the Civil Rights Act and general public interest concepts. Also, the penalty and enforcement provisions of the Natural Gas and Federal Power Acts, 15 U.S.C. 717s, 717t, 16 U.S.C. 825m, 825n, 825o, relate to proscribed conduct under those Acts. Section 14 of the proposed rule is directed to other laws. Section 15 of the proposed rule presents a similar legal difficulty in respect to appellate review procedures. Natural Gas and Federal Power Acts, 15 U.S.C. 717r, 16 U.S.C. 8251. Section 13 of the proposed rule assumes authority in this Commission to provide counsel fees. This agency does not have such authority. See, Power Authority of the State of New York, Order Denying Motions and Appeals, ___ FPC ___, issued October 29, 1971 (mimeo. ed., pp. 3-4).

Administratively, the rule, as proposed, would be duplicative of established procedures which now operate throughout the Nation in respect to equal employment opportunity. These procedures are as outlined, supra. The Department of Justice has instituted a number of enforcement actions under those procedures. See, for example, United States v. Louisville Gas and Electric Company, United States District Court for the Western District of Kentucky, Civil Action No. 7312-G, order June 30, 1972; United States v. Piedmont Natural Gas Company, United States District Court for the Western District of North Carolina, Civil Action No. 72-128,

order June 15, 1972; United States v. Virginia Electric and Power Company, et al., 327 F. Supp. 1034 (1971), 4 EPD Paragraph 7502 (1971); and, United States v. Georgia Power Company, 3 EPD Paragraphs 8143, 8318 (appeal pending USCA5, No. 71-344).

To adopt the proposed rule would (a) make the criminal penalties of the Natural Gas Act, 15 U.S.C. 717t, and the Federal Power Act, 16 U.S.C. 825o, apply to violations of whatever employment codes were adopted by the Commission, and there is no indication of Congressional intent for this result; (b) make the determination of a violation subject to administrative hearings rather than through trial in court, and the 1972 Act makes clear that the Congress intended a judicial, not an administrative, forum, pp. 10-11, supra; (c) make the determination of a just and reasonable rate turn on employment practices rather than upon adequate and reliable service to consumers at the lowest reasonable rate. In our view, Congress has not indicated that consumers should pay higher rates to companies which have FPC approved employment plans and lower rates to companies which do not; (d) make the determination of whether new facilities to supply needed energy to all citizens can be licensed turn upon the question of whether the company proposing the facilities has an FPC approved employment plan. Conversely, facilities already supplying needed energy would presumably be shut down as a sanction for violation of an FPC approved employment plan. There is no indication that Congress intended such a result; and (e) make a further proliferation of agencies having concurrent jurisdiction at a time when Congress has made clear its intent to coordinate such activities. This agency could not "coordinate" with other agencies on cases which are controlled by the Administrative Procedure Act.

Thus, we conclude that the primary jurisdiction over labor and employment practices lies in other agencies, as petitioners recognize when their proposed rule calls for the FPC to defer to EEOC; we conclude that that jurisdiction is exclusive in those agencies. We further conclude that neither the Natural Gas Act and Federal Power Act delegate authority to FPC to regulate employment practices, and that we hold that since there is no jurisdiction to adopt such a rule, no purpose will be served by noticing such a rule for consideration for adoption in advance of a declaratory judgment determining the jurisdiction of the Commission.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h to order as hereinafter provided.

The Commission orders:

The petition as described above, is hereby dismissed for lack of jurisdiction

By the Commission
(S E A L)

Kenneth F. Plumb,
Secretary.

APPENDIX C

ORDER OF THE

FEDERAL POWER COMMISSION

DENYING PETITION FOR

REHEARING

(August 21, 1972)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr.,
and Pinkney Walker.

The National Associaiton for the Advancement of Colored People et al.	)	Docket No. R-447

ORDER DENYING PETITION FOR REHEARING

(Issued August 21, 1972)

Petitioners in the above-entitled matter on August 8, 1972, filed a petition for rehearing of Commission Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Employment Practices, issued July 11, 1972. Petitioners annex to their petition a letter of Chairman William H. Brown, III, Equal Employment Opportunity Commission, dated July 13, 1972, addreseed to the Chairman of the Federal Power Commission.

The assignments of error and grounds for rehearing set forth in the petition, including Chairman Brown's letter, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 623, or which, having now been considered, warrant any modification of that Opinion. Opinion No. 623 dismissed for lack of jurisdiction a petition filed June 22, 1972.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h, 1, to order as hereinafter provided.

The Commission orders:

The petition for rehearing of Commission Opinion No. 623, issued July 11, 1972, is hereby denied.

By the Commission.
(S E A L)

Mary B. Kidd,
Acting Secretary.

APPENDIX D

OPINION OF THE UNTIED

STATES COURT OF APPEALS

FOR THE DISTRICT OF

COLUMBIA CIRCUIT

(No. 72-1959, February 5, 1975)

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1959

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

THE FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Order of
The Federal Power Commission

Decided February 5, 1975

Howard A. Glickstein, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *William L. Taylor* was on the brief, for petitioners.

John H. Burnes, Attorney, Federal Power Commission, with whom *Leo E. Forquer*, General Counsel, and *George W. McHenry, Jr.*, Acting Solicitor Federal Power Commission, were on the brief, for respondent.

Martin Slate, Attorney, Equal Employment Opportunity Commission, as *amicus curiae*. *Julia P. Cooper*, Assistant General Counsel Equal Employment Opportu-

nity Commission, and *Beatrice Rosenberg*, Attorney, Equal Employment Opportunity Commission, filed a brief on behalf of the Equal Employment Opportunity Commission as *amicus curiae* urging reversal.

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: This petition for direct review of an order of the Federal Power Commission raises a question as to the precise scope of the regulatory authority vested in that agency by the Congress. It concerns in particular a request made of the Commission, and dismissed by it for lack of jurisdiction, to initiate rule making proceedings in respect of asserted employment discrimination by its regulatees. Because of the confused and contradictory manner in which the important jurisdictional issues involved in this case are presented by all parties to this appeal, we vacate the Commission's order of dismissal, and remand the case for further consideration in light of this opinion.

I

Petitioners are a number of organizations concerned with advancing the interests of black, Spanish surnamed, native, and female Americans. Charging widespread discrimination in the employment of these groups by natural gas and electric utility companies, they petitioned the Commission for "the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees," [1] and attached to their petition a "proposed rule," which we append to this opinion. We recount its operative provisions.

Section 2 declares that equal employment opportunity will be considered an element of the "public interest," a

[1] Petition of NAACP, et al; FPC Docket No. R-447, JA 1.

criterion by which the Commission must make many of its rate making and licensing decisions. Section 3 details the substantive duties of regulatees not to discriminate in any employment practice on the basis of race, color, religion, sex or national origin. Sections 4 and 5 impose on regulatees the duty to devise and to implement affirmative "equal employment opportunity programs," the general purpose of which is to involve every regulatee in a "continuing campaign to exclude every form of prejudice or discrimination . . . from its personnel policies and practices," and the specific contents of which are to include such measures as the active recruitment of minority and female employees through advertisement in media having significant circulation among those groups, the avoidance of selection techniques and tests that have the effect of disadvantaging minority groups and females, and the publication to the regulatee's management staff and employees of a rigid anti-discrimination policy.

Section 6 of the proposed rule requires each regulatee to file annually with the Commission a copy of the "EEO-1" form which it already must file annually with the United States Equal Employment Opportunity Commission. Section 7 makes it a necesary part of each regulatee's application for a rate change, license or other necessary Commission approval that a report be submitted on the nature and success of the regulatee's affirmative "equal employment opportunity program" and on any complaints of employment discrimination that have been made against the regulatee. Section 9 obligates the Commission to entertain individual complaints of employment discrimination by regulatees, and to conduct hearings and issue decisions and orders pursuant to its existing procedural regulations.[2]

[2] Such of those complaints as claim violations of any provision of Title VII of the Civil Rights Act of 1964 may be referred to the Equal Employment Opportunity Commission.

The proposed rule's section 10 authorizes intervention by complainants of employment discrimination in any rate making or licensing proceeding involving the regulatee complained against. Section 11 reinforces section 2, described above, by specifying that a regulatee's record of compliance with the proposed rule will be given "material consideration" by the Commission when it passes on any request by that regulatee for a rate change, license, or other necessary Commission approval, with Commission action on such requests being denied or conditioned accordingly. Section 14 imposes, for violation of the proposed rule, the usual $500-a-day fine for violation of Commission rules.

The response of the Commission was to treat the petition for rule making as one for a declaratory order, and to issue such an order, the substance of which was a refusal to initiate the requested rule making on the ground that the Commission had "no jurisdiction to adopt such a rule." [3] When they requested a rehearing by the Commission, petitioners appended a letter supporting their position from the Chairman of the Equal Employment Opportunity Commission, *id.* at 90, which agency

[3] JA 56, 77. We note in passing that there is some uncertainty as to what exactly is before us for review. We are confronted with what is styled a declaratory order, though why the Commission thought this the proper medium through which to assert a jurisdictional barrier to the requested rule making is not clear to us. The procedural waters have been further muddied by the wording of the Commission's formal order, which dismissed the petition "as described above," *id.* at 77, the Commission having treated the petition as one for a declaratory order. It might therefore be said that what we are confronted with is not even a declaratory order refusing to initiate rule making, but a declaratory order refusing to issue a requested declaratory order. We pass over these ambiguities, however, preferring to treat the Commission as having done exactly what in substance it did do, namely, to refuse on jurisdictional grounds to initiate the requested rule making.

has also filed an *amicus* brief with this court. The Comcission denied the petition for rehearing as "setting forth no new facts or principles of law," *id.* at 93, and the way was thus cleared for this direct review proceeding.

A close analysis of the procedural posture of this appeal reveals a double ambiguity. By requesting "*a rule* requiring equal employment opportunity and nondiscrimination in . . . employment practices," the petitioners left unclear whether they were asking for their proposed rule and no other, or merely for a rule making proceeding on the subject of employment discrimination generally, with the proposed rule perhaps serving only as a model or point of departure. By asserting its lack of jurisdiction to adopt "*such a rule*," the Commission in turn left unclear which of these requests it was denying its jurisdiction to grant. We do not know whether its order asserted a lack of jurisdiction to adopt (1) the specific proposed rule, or (2) *any* rule relating to employment discrimination by regulatees.

The ambiguity is unfortunately not resolved by examining the positions taken by the parties in the record and in their briefs. In their petition for rule making, petitioners first proposed the adoption of "a rule" relating to employment discrimination, but then went on to ask the Commission more expansively to "[p]rescribe *regulations* prohibiting discrimination . . . and assuring equal opportunity in the employment practices of its regulatees." (Emphasis added.) *Id.* at 3. The Commission's opinion denying the rule making petition, although it devoted considerable attention to the jurisdictional problems raised by certain aspects of the proposed rule in particular and concluded by denying its jurisdiction to adopt "such a rule," stated at an earlier point that "[t]he Commission lacks the legal authority to promulgate equal employment opportunity *regulations* . . . because its lacks the requisite delegation of Congressional

authority to act *in that area.*" (Emphasis added.) *Id.* at 57, 75-77.

The confusion persists in the briefs filed in this court. In footnote 87 (at p. 54) of their brief, petitioners respond to the Commission's objections to particular aspects of the proposed rule, one such objection being that it would result in public disclosure of information protected from such disclosure by the Civil Rights Act. The petitioners' answer that "[w]e are confident that sufficient expertise and competence exists at the Commission to devise a rule against employment discrimination that would be effective and in harmony with other laws and regulations," suggests that petitioners do not view themselves as having asked for and been denied a specific proposed rule but rather rule making in general. On the other hand, they conclude their brief in this court by asking "that the Federal Power Commission be directed to proceed with utmost dispatch in *issuing the rule requested.*" (Emphasis added.) *Id.* at 54, 68-69.

Similarly, the Commission in its brief (at 3-4) states in one sentence that it "dismissed the petition for lack of jurisdiction to adopt the requested rule," and in the next sentence states that it "denied the requested relief because, in its view, it lacked the requisite Congressional authority to promulgate equal employment opportunity regulations. . . ." Further, there are internal contradictions in the Commission's brief. It states the issue to be whether it has any jurisdiction, in the course of discharging its regulatory responsibilities, to take the existence of proven employment discrimination into account, and broadly argues that it does not. However, at one point in its brief (at 30) the Commission says:

> . . . [I]t will suffice to say that no costs can be passed on to the ultimate consumer without the approval of the Commission. If any party wishes to challenge the propriety of certain costs, *e.g.*, those

> incurred through discriminatory employment practices, he is free to intervene and make his position known in the appropriate rate proceeding.

It is obvious that a concession of this kind is not compatible with any flat statement that the Commission has no authority to consider the fact of employment discrimination in its public interest determinations.

In its *amicus* brief the EEOC states the "Question Presented" as that of

> Whether the Federal Power Commission in exercising its public responsibilities has the authority to consider the discriminatory employment practices of its regulatees, or whether it must ignore such discrimination on the basis of Race, sex, or national origin, no matter how blatant or wide-spread?

It indicates generally in its brief that the issue is whether the FPC has jurisdiction to adopt *some* rules relating to employment discrimination, stating at one point (at 4-5) that "we do not argue that the Power Commission is required to consider every complaint of discrimination against a utility which it regulates . . . [but only that it cannot] ignore widespread general discrimination. . . ."

It is possible that the parties are closer together than they think. Whether this is true or not, the case is before us on representations by both sides which, on close analysis, suggest that the parties may be talking past each other. We cannot ignore the fact that this confusion exists, for it is crucial to our disposition, as will become clear from the discussion hereinafter of the apparent boundaries of the Commission's jurisdiction. From this point forward it is important to distinguish between two kinds of jurisdiction: One—to which the proposed rule extends—embraces power on the part of the Commission to prescribe personnel practices in detail and to receive complaints, adjudicate them, and punish directly infractions of those practices. The other—which

even the Commission appears to contemplate may exist—is power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations.

II

Petitioners assert first a statutory and then a constitutional basis for their claims of broad Commission jurisdiction over the employment practices of regulatees.[4] We shall consider these in the same order, concluding that the Commision is neither empowered nor required to adopt the rule as proposed, but that it does possess jurisdiction of the more limited kind conceded by it in its brief.

There is one preliminary observation to be made. In arguing for their proposed rule, petitioners emphasize the great importance of the fight against employment discrimination. While reiterating our belief in that importance, we must also note the limited relevance of that belief to this appeal. For one thing, Congress need not be accused of slighting the importance of achieving equal employment opportunity merely because of a decision

[4] Petitioners' brief contains a third section in which arguments are made that (1) no other federal law "preempts" the Commission from acting to proscribe employment discrimination by regulatees and (2) the Commission's doing so would effectively promote the national policy against such discrimination. Br. 45-54. A claim of "preemption," if it is at all distinct from the assertion that statutory authority is simply lacking, adds only the notion that such authority might once have existed and been withdrawn. In fact no such distinct contention appears to have been made by the Commission, and, accordingly, we do not treat the matter separately. Neither do we treat separately the alleged potential efficacy of the Commission in combatting employment discrimination, of which the only apparent relevance to this appeal is the possible inference that Congress should not be considered to have eschewed the use of so powerful a weapon.

on its part that this task is not one it chose to assign to the Federal Power Commission. There are good reasons why Congress might have reached such a decision. The goal itself might have been thought better served by centralizing responsibility for its achievement (in the Justice Department and the Equal Employment Opportunity Commission, for example) rather than by diffusing it among many and thus suffering a loss in the degree of accountability and a gain in the number of jurisdictional overlaps and conflicts.

More important, Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's principal task of passing on statutorily specified license and rate applications is prodigious.[5] To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problems of employment discrimination regulation might divert an inordinate amount of their energies and skills from the ends to which these are most productively applied.

This discussion of the merits of combining in one agency the responsibilities for insuring efficient power pro-

[5] The dimensions of the task are suggested by a partial list of applications to, and actions by, the Commission during fiscal 1973: 56 wholesale electric rate increase applications; 11 electric company sale and consolidation applications (all disposed of), 75 electric company securities issuance applications (all disposed of); 116 electric power project license and permit applications (90 disposed of, leaving 529 pending); 215 pipeline rate increase applications; 280 pipeline construction certificate applications (212 disposed of, leaving 214 pending); 6,844 gas producer rate increase applications; 1,383 gas producer certificate applications (955 disposed of, leaving 2,059 pending); 216 gas producer abandonment applications (171 disposed of, leaving 287 pending). FPC, 1973 ANNUAL REPORT 19, 20, 41, 56, 58, 59, 60 (1973).

duction and for curtailing employment discrimination is obviously much abbreviated. We do not prolong it, however, for the reason that, beyond assuring ourselves that it would not be unreasonable for Congress to divide these responsibilities or to allocate their sharing in differing manners and proportions, we are not concerned with why Congress may have done so, but whether it did; and to that question we now turn.

A. *The Relevant Statutes.*

1. *Federal Water Power Act.*

The Commission was first brought into being by the Federal Water Power Act of 1920.[6] The principal powers delegated to it by that Act, along with the stated criteria for their exercise, are as follows: to issue licenses, with appropriate conditions, for "necessary or convenient" navigation and power projects on Federal waterways;[7] to recommend that "the development of any water resource for public purposes . . . be undertaken by the United States itself," refusing to renew existing licenses on that account;[8] to require modification of proposed projects in order to effect a "comprehensive plan" for the use of Federal waterways in commerce, power generation, and "other beneficial public uses, including recreational purposes";[9] to regulate the operation of licensed projects "for the protection of life, health, and property";[10] in the absence of state regulation, to regulate security issuances by licensees, and also to set "reasonable, non-discriminatory, and just" rates for interstate sales of power from licensed projects."[11]

[6] 41 Stat. 1063 (June 10, 1920), *as amended* 16 U.S.C. §§ 791-823 (1970).

[7] 16 U.S.C. §§ 797(e), 799, 817 (1970).

[8] *Id.* §§ 800(b) and (c), 807.

[9] *Id.* § 803(a).

[10] *Id.* § 803(e).

On its face, the Act thus displays a primary congressional concern for the orderly and coordinated development of water resources, and also for interstitial Federal regulation of the sale of power derived therefrom. Otherwise, the only expressed concern with the internal operations of licensees relates to health and safety features of licensed projects. Broad references to the "public interest," on which petitioners place such great emphasis, are rare in the Act. Where they do occur, moreover, they strongly suggest by their contexts that what is meant is not the public interest generally, but the public's interest in the optimal use of the waterways. Thus, Section 4 requires that contemplated improvements in waterways be "desirable and justified in the public interest *for the purpose of improving or developing a waterway* . . . (emphasis added)."[12]

The legislative history of the Act holds few surprises. It reveals a Congress whose attention was steadily fixed upon two principal objectives: to exploit the hydro-electric resources of a nation that even then was energy-deficient,[13] and to substitute for its earlier piecemeal approach to the problem a method of comprehensive planning which would accomplish, among other things, the conservation of natural resources.[14]

[11] *Id.* § 813.

[12] *Id.* § 797(e). *See also id.* §§ 797(g), 800(a).

[13] *See* H. R. REP. No. 61, 66th Cong., 1st Sess. 4-5 (1919); S. REP. No. 180, 66th Cong., 1st Sess. 2-3 (1919).

[14] *See* H. R. REP. No. 61, supra note 36, at 2-3; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 613 (2d Cir. 1965). *See also* Udall v. FPC, 387 U.S. 428 (1967).

2. *Federal Power Act.*

The Commission's authority was substantially broadened by the Federal Power Act, enacted as Title II of the Public Utility Act of 1935.[15] Among its newly delegated powers were the following: to order such interconnections of electric power transmission facilities, setting such terms and conditions for the same, as are "necessary or appropriate in the public interest";[16] to approve such asset sales and consolidations of interstate electric power companies as are "consistent with the public interest";[17] to approve such securities issuances by those companies as are "compatible with the public interest" and "consistent with the proper performance of service . . . as a public utility";[18] to determine "just and reasonable" rates for interstate sales and transmissions of electric power;[19] and to order that "proper, adequate or sufficient" interstate power service be rendered.[20]

The Act's preamble echoes the generality of the foregoing quoted phrases, declaring that the sale and transmission of electric power are "affected with the public interest," federal regulation of interstate aspects being "necessary in the public interest."[21] The statute itself nowhere defines the "public interest," but instead leaves the precise ambit of the Commission's concern uncertain. Of the Commission's primary task there is no doubt, however, and that is to guard the consumer from exploitation by non-competitive electric power companies. The Act itself speaks of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy."[22] It was passed in conjunction with the Public Utility Holding Company Act of 1935, whose stated policy was to undo the effects of the holding companies' exercising undue control over the power industry, one of these effects being excessive charges to subsidiaries because of "an absence of arm's-length bargaining [and] restraint of free and independent competition."[23] Congress's central concern with exploitation is of course reflected in the statute's emphasis on just and reasonable prices, as well as by its frequent references to the financial and accounting aspects of electric company operations.[24] The legislative history of the Act adds little to our understanding. It reveals that Congress's goal was, once again, the "planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible price."[25]

[15] 49 Stat. 803, 838 (Aug. 26, 1935), *as codified* 16 U.S.C. §§ 824-25 (1970).

[16] 16 U.S.C. § 824(a) (1970).

[17] *Id.* § 824(b).

[18] *Id.* § 824(e).

[19] *Id.* § 824(f).

[20] *Id.* § 824(f).

[21] *Id.* § 824(a).

3. *Natural Gas Act.*

The Natural Gas Act of 1938[26] further empowered the Commission, in part: to approve imports and exports of natural gas unless it finds that these "will not be in

[22] *Id.* § 824(a). *See also id.* § 825(s) (government-produced power to be disposed of "in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers").

[23] Public Utility Holding Company Act of 1935 § 1(b)(2), 15 U.S.C. § 79a(b)(2) (1970).

[24] *See* 16 U.S.C. §§ 824g, 824h(b), 825(a), 825a, 825c, 825h.

[25] S. REP. No. 621, 74th Cong., 1st Sess. 17 (1935).

[26] 52 Stat. 821 (June 21, 1938), *as codified*, 15 U.S.C. § 717 *et seq.* (1970).

the public interest";[27] to set "just and reasonable" rates for the interstate transportation and sale of natural gas;[28] to order such expansions and interconnections of natural gas transportation facilities as are "in the public interest" and do not impose an "undue burden";[29] to disallow abandonments except as the "public convenience and necessity permit[s]";[30] and to license interstate transportation and sale of gas by reference to the "public convenience and necessity."[31]

As in the case of the Federal Power Act, the statute's preamble declares that interstate gas operations are "affected with a public interest" and must "in the public interest" be regulated, but leaves the exact content of these terms in doubt. Again, however, there is no question that the exploitation of the gas consumer was uppermost in Congress's mind. The statute begins with a reference to certain reports made by the Federal Trade Commission, the central conclusion of which had been that anticompetitive practices and overconcentration of control in the natural gas industry were leading to the payment of excessive prices by the consumer.[32] The statute evinces the same concern for "just and reasonable" rates as does the Federal Power Act, with an added preference for decreasing rather than increasing those rates,[33] and

[27] 15 U.S.C. § 717b (1970).

[28] *Id.* § 717c and d.

[29] *Id.* § 717f(a).

[30] *Id.* § 717f(b).

[31] *Id.* § 717f(e).

[32] *See* Federal Trade Commission, FINAL REPORT TO THE SENATE PURSUANT TO S. RES. NO. 83, 70th Cong., 1st Sess. S. DOC. NO. 92, Pt. 84-A, 70th Cong., 1st Sess. (1936) at 581-617; FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

[33] The Commission may decrease but not increase rates on its own motion. 15 U.S.C. § 717d (1970).

there is the same frequency of reference to the financial and accounting aspects of gas company operations.[34]

The elements of the "public interest" are never detailed in the congressional debates and reports, but there are innumerable references to the problem of consumer exploitation.[35] Indeed, the Act as originally passed stated its primary concern with this problem in as many words:

> . . . [I]t [is] the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.[36]

The quoted passage was lost to later amendments, but these were not intended as revisions either of Congress's objective or of the Commission's charter.[37]

B. *FPC Regulation of Employment Discrimination Per Se.*

The more extensive of the two kinds of jurisdiction described above—that consistent with the adoption of the petitioners' proposed rule—would in our view necessarily entail a power on the Commission's part to regulate employment discrimination *per se*, a power, in other words, to act to curtail employment discrimination merely for the sake of seeing that practice curtailed. The Commission could only have such power, of course, if the cur-

[34] *See* 15 U.S.C. §§ 717h, 717, 717m(b), 717o, 717p(b).

[35] *See* S. REP. NO. 1162, 75th Cong., 1st Sess. (1937); H. R. REP. NO. 709, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 6720-33, 9314-17 (1937).

[36] Natural Gas Act § 7(c), 52 Stat. 821, 825 (1938) *as amended*, 15 U.S.C. 717f (1970).

[37] Act of Feb. 7, 1942, 56 Stat. 83 (1942), as codified 15 U.S.C. § 717f(c)-(h). *See also* H. R. REP. No. 1290, 77th Cong., 1st Sess. (1941).

tailment of employment discrimination were itself among the Commission's statutorily defined objectives. To judge the validity of the proposed rule, therefore, we must first ask whether the Congress did indeed entrust to the Commission this particular responsibility.

Judicial precedent suggests that the Commission's responsibilities are limited to those that we have identified above in discussing the statutes and their histories. The courts have, for example, described the Federal Water Power Act as "the outgrowth of a widely supported effort on the part of conservationists," *Scenic Hudson Preservation Conference v. FPC*, 334 F.2d 608, 613 (2d Cir. 1965), and have stated that a "major purpose of the whole [Federal Power] Act is to protect consumers against excessive prices." *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). It has been said that the Commission's task under the Natural Gas Act is to effect "a balancing of the investor and the consumer interests," on the one hand, to see that "the return to the equity owner [is] sufficient to maintain confidence in the financial success of the enterprise, so as to maintain its credit and attract capital," and, on the other, to "protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Natural Gas*, 320 U.S. 591, 603, 610 (1944).[38]

A concise description of the principal objectives of Commission activity must therefore be the following: first, to oversee the orderly development of water power and other natural resources, and, second, to bring about the production of power in the greatest possible quantity and at the lowest possible cost to the consumer in the long run—in the economist's terms, to insure the efficient performance of an industry in which the normal forces

[38] *See also* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388 (1959) ("purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumer").

of competition are for one reason or another not equal to the task.[39]

Petitioners maintain, however, that the Commission may properly concern itself with employment discrimination *per se* under the statutory command to the Commission to regulate "in the public interest," and by similar vague criteria. We turn, then, to the question of the proper interpretation of these criteria, and thereafter to a consideration of whether our views are consistent with prior decisions of analogous questions of agency jurisdiction.

1. *The "Public Interest."*

The Supreme Court has stated that the words "public interest" do not constitute a "mere general reference to the general welfare, without any standard to guide determinations." Rather the Court, in interpreting the Interstate Commerce Act, insisted that "the term 'public interest' . . . has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and appropriate provision and best use of transportation facilities . . . ." *New York Central Securities Co. v. United States*, 287 U.S. 12, 24 (1932).

[39] A particularly lucid elaboration of this latter function was given by Judge Wright in Northern Natural Gas v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968):

> . . . [The] basic goal of direct governmental regulation through administrative bodies and the goal of individual government regulation through the antitrust laws is the same—to achieve the most efficient allocation of resources. For instance, whether a regulatory body is dictating the selling price or that price is dictated by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable return on capital . . . .

See also Lynchburg Gas Co. v. FPC, 336 F.2d 942, 949-50 (D.C.Cir. 1964).

As was succinctly said in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), also involving the powers of the Interstate Commerce Commission, its primary statutory objective of insuring efficient transportation service is "the Commission's guide to the public interest." *Id.* at 82.

We ourselves noted in *Alabama Electric Cooperative Inc. v. SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966), that

> "[w]ords like 'public interest' . . . , though of wide generality, take their meaning from the substantive provisions and purposes of the Act."

And in a recent case where the jurisdiction of the FPC in particular was at issue, we declared that:

> A particular statute may have such a setting that, on consideration of its legislative history, the nature of the agency, and breadth of responsibility involved, and other material factors, a court may come to the conclusion that though its public interest language is broad its meaning in context warrants a relatively restricted reading.

City of Lafayette v. SEC, 454 F.2d 941, 948 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).[40]

---

[40] *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 216, 219 (1943) (FCC not empowered by "public interest" criteria to act upon "generalities unrelated to the living problems of radio communication"); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public interest" to be interpreted in light of "its context . . . the nature of radio transmission and reception, [and] . . . the scope, character, and quality of service"); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) ("Especially with First Amendment issues lurking in the background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by defineable standards."), *cert. denied*, 396 U.S. 842 (1969); City of

We must conclude, therefore, that Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas.

2. *Related Jurisdictional Issues.*

a. *The FPC and Antitrust Considerations.*

Much is made by petitioners of our numerous holdings that the Commission may, and in some cases must, take into account the anticompetitive activities of regulatees as well as the anticompetitive effects of proposed Commission actions. *See, e.g., City of Lafayette* v. *SEC*, *supra; Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953 (D.C.Cir. 1968); *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (D.C.Cir. 1956).[41] These do not, however, establish that the content of the "public interest" criterion is generally supplied by other national policies and laws. *Some* such policies and laws are surely relevant, but not simply because they exist. They are relevant because their objectives "can be related to the objectives of the statute administered by the agency." *City of Chicago* v. *FPC*, 385 F.2d 629, 635 (D.C.Cir. 1967). Recalling the primary objectives of the Commission as we have described

---

Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967) (agency may consider congressional objectives expressed in other legislation "assuming they can be related to the objectives of the statute administered by the agency"), *cert. denied*, 390 U.S. 945 (1968).

[41] *See also* Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485, 492-493, (1967); California v. FPC, 369 U.S. 482, 484-485 (1962); United States v. Borden Co., 308 U.S. 188, 198-199 (1939); Lynchburg Gas Co. v. FPC, 336 F.2d 942, 946, 949-950 (D.C. Cir. 1964); Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 235 (D.C. Cir. 1951), *aff'd.* 343 U.S. 414 (1952).

them above, one would be hard put to think of a matter of more direct and proper concern to the Commission than the state of competition in the regulated industry. By doing whatever is within its power to enhance that competition, the Commission serves the same objective as it does by direct regulation of price; indeed, Commission decisions affecting the structure of the power industry could scarcely be made rationally without regard to the impact they will have on the competitive climate.

If express statutory authority to consider antitrust policies were needed, moreover, it would not be lacking. Although the Commission is nowhere empowered to enforce the antitrust laws as such,[42] it is authorized by the Natural Gas Act to transmit evidence of apparent violations of those laws to the Attorney General. 15 U.S.C. § 717s(a) (1970). The Federal Water Power Act specifies, moreover, that project licenses are to be issued by the Commission with the condition that:

> Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

16 U.S.C. § 803(h) (1970). *See also Northern Natural Gas* v. *FPC*, 399 F.2d 953, 959-60 (D.C.Cir. 1968).

b. *The FPC and Environmental Considerations.*

It has also been held that environmental considerations are the proper concern of the Commission. *See, e.g., Udall* v. *FPC*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965). But, as we have seen, the Commission's explicit mandate includes the preservation as well as the exploitation of water resources, the Water Power Act of 1920 having been "the outgrowth of a widely supported effort on the part of conservationists." *Scenic Hudson Preservation Conference* v. *FPC*, *supra* at 613. The Act itself instructs the Commission to consider the "recreational purposes" to which water resources might be put. 16 U.S.C. § 803(a) (1970). Finally, environmental considerations have been expressly made the business of all Federal agencies by the National Environmental Policy Act of 1970. *See* 42 U.S.C. § 4332(A)-(H) (1970); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

[42] *Compare* 15 U.S.C. § 21(a) (1970) (enumerating other agencies empowered to enforce the Clayton Act).

It is convenient at this point to mention Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972,[43] counterparts of NEPA in the field of employment discrimination. In thus specifically legislating in the area of equal employment opportunity, Congress did not in our view curtail any agency's existing authority in that area, but there are several other things it did not do. It did not, in the manner of NEPA, explicitly enjoin every federal agency to concern itself with employment discrimination; to the contrary, it centralized responsibility for such matters in the Equal Employment Opportunity Commission. Strong evidence of Congress's specific desire not to diffuse authority over employment discrimination among federal agencies other than the EEOC is also found in section 604 of Title VI of the Civil Rights Act of 1964.[44] All federal agencies are directed by that Title to administer contracts and subsidies in such a way as to insure that discrimination is not practiced "under any program or activity receiving Federal financial assistance." Section 604 provides, however, that:

[43] 42 U.S.C. § 2000e (1970).

[44] 42 U.S.C. § 2000d *et seq.* (1970).

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. 2000d-3 (1970).

c. *The FCC and Employment Discrimination.*

Our attention is directed to the fact that the Federal Communications Commission has adopted regulations governing the employment practices of its regulatees. *See* 47 CFR §§ 21.307, 76.311. While the validity of these regulations is not now, and appears never to have been, before us, that issue is in any case readily distinguishable from the one that is.

We have specifically recognized the responsibility of the FCC to guard against racially discriminatory programming. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The FCC has reached the conclusion that a broadcaster's programming will inevitably fail fairly to reflect the tastes and viewpoints of minorities if those minorities are systematically excluded from the broadcaster's employ.[45]

---

[45] The FCC in its Memorandum Opinion and Order and Notice of Proposed Rulemaking on this matter stated in part that:

> A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts.

33 F.R. 9960, 9962 (1968).

This is a far different question from the one involved in the appeal before us. The FPC is expressly charged with proscribing any discrimination, including, of course, racial discrimination, in the services that its regulatees render to the public. 15 U.S.C. §§ 717c(b) and d(a); 16 U.S.C. §§ 824d(b) and e(a) (1970).[46] But the likelihood that racial discrimination in employment might work its way into the provision of those services seems to us a slight one. More important perhaps, we would expect such service discrimination to be far more easily identified and remedied than is true of discrimination in programming, which might be so subtle and unsusceptible of direct remedy as to require the eradication of its root cause.

d. *Other Agenices and Employment Discrimination.*

Petitioners cite several other instances of agency action to curb employment discrimination by regulatees. The Securities and Exchange Commission in 1971 issued a release which called attention to existing requirements that registrants disclose on appropriate SEC forms the pendency of civil rights proceedings which could affect their business activities. In thus acting, however, the SEC appears to us merely to have been fulfilling its proper role of seeing that investors are fully informed of circumstances which might bear on the financial pros-

---

[46] It is to this specific statutory instruction to prohibit service discrimination by regulatees, rather than to the "public interest" standard, that the Commission points as support for its regulation of discrimination at recreational facilities at hydroelectric facilities. Br. 29; Order No. 341, 37 FPC 775 (1967).

pects of securities-issuing corporations. A corporation's involvement in civil rights litigation may constitute such a circumstance, as may its involvement in any other kind of litigation. Indeed, the SEC release in question was only partly directed at disclosure of pending civil rights proceedings; it also called attention to the existing requirement that registrants disclose the pendency of suits against them under federal environmental protection laws. *See* SEC Securities Act Release No. 5170 & Exchange Act Release No. 9252 (1971).

We note also that the SEC has expressly declined to promulgate rules concerning employment discrimination by regulatees, reasoning that "[a]lthough . . . the Commission may act to assure that regulated entities do not follow practices (including employment practices) that may prove inimical to the investing public or . . . other elements of the Commission's concern," it has not been adequately shown "what the impact of such practices might be on the investing public and our capital markets." 39 Fed. Reg. 2809, 2810 (1974). *See also* 37 Fed. Reg. 28,767 (1972).

The Interstate Commerce Commission and Civil Aeronautics Board have each given notice of proposed rulemaking on the subject of employment discrimination by regulatees, but neither agency has taken any further action. *See* 36 Fed. Reg. 10,741 (1971); 37 Fed. Reg. 15,518 (1972). Of the Federal Home Loan Bank Board's regulations governing the employment practices of regulated banks, 12 C.F.R. § 528.7 (1974), it suffices for the moment to say that their validity is not an issue in this appeal.

C. *FPC Regulation of Employment Discrimination Coincidentally to Proper Commission Concerns.*

The foregoing suggests our inability to find that Congress intended for the Commission to entertain and to

adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes. At the same time we cannot state flatly that the Commission may never "regulate" employment discrimination, if by that it is meant that such discrimination can never figure in the Commission's regulatory calculations. We can foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, could be reasonably related to the pursuit of the Commission's proper objectives. We therefore conclude that the Commission does have jurisdiction over employment discrimination in the narrower sense described at the outset of the discussion.

The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination,[47] (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because

---

[47] *See* Exec. Order No. 11,246 3 C.F.R. 169 (1974) (all contracts with federal government to include private contractor's promise not to discriminate in employment; contracting government agencies to cancel for breach of such promise).

of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

Obviously such costs of employment discrimination range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable. The problem of how to see that they are not borne by the consumer could arise in any number of different regulatory contexts, including both rate and certificate proceedings. We therefore do not attempt to detail all the various ways the Commission may thus "regulate" employment discrimination, leaving this in the first instance to the Commission itself.

A regulatee's performance in the area of equal employment opportunity may also be relevant to that company's efforts to secure a license renewal or other Commission authorization. It is conceivable that an applicant's record could be so riddled with discrimination-related legal difficulties, and its future so lacking in any promise of improvement on that score, that the Commission could validly conclude that for this reason it should not be permitted to be the recipient of franchise grants. In the long run, after all, the most efficient, lowest-cost production and distribution of electricity and natural gas will be that which is conducted in compliance with the laws, employment discrimination laws and other laws alike.

Moreover, the Commission is not necessarily confined to consideration of employment discrimination in successive adjudicatory proceedings. There are any number of matters on which it might be positively beneficial for the Commission to make rules rather than proceed on a

case-by-case basis. There is the potentially quite complex question of what costs associated with employment discrimination litigation will and will not be disallowed. It is at least conceivable that a regulatee with a very poor equal employment opportunity record might be presumed to have incurred excess labor costs because of its exclusionary practices, and that these costs, being difficult to quantify and prove, will be rebuttably presumed to equal a certain percentage of actual labor costs.

The line is always to be drawn between regulation reasonably related to the Commission's central functions, and regulation of employment discrimination for its own sake. The line may well be difficult to draw on occasion, but it is the business of agencies—and of courts—to do so.

D. *The Commission's Constitutional Obligations.*

Petitioners' claim founded on the Constitution is that it not only empowers but also requires the Commission to proscribe employment discrimination by regulatees. This is because the actions of the regulated companies are assertedly "state action" and therefore subject to the Fifth Amendment's prohibition of racial discrimination. Three circumstances are relied on as establishing the necessary intertwining of government with private entity which results in the latter's conduct being considered "state action." These are (1) the otherwise comprehensive extent of federal regulation of the FPC regulatees; (2) the enjoyment by the companies of what amounts to a government-granted monopoly; and (3) their performance of a governmental function in the production and transmission of energy. The Commission meets the "state action" claim by denying that the government is "significantly involved" with the regulated companies.[48]

[48] We note that the Supreme Court recently held in Jackson v. Metropolitan Edison Co., —— U.S. —— (Dec. 23, 1974),

In our view, however, the question that is most immediately relevant to the powers and duties of the Commission to regulate employment discrimination is not the familiar one of "state action" *vel non*, but the distinct, if seldom isolated, issue of what the consequences may be of a finding of "state action."

The most familiar, and perhaps also the most natural, consequence of the erasure of the distinction between government and private entity is that the constitutional obligations of the government—not to discriminate on racial grounds, not to infringe freedom of speech, etc.—devolve as well upon the ostensibly private entity and are enforceable against it.[49] It is possible, however, that the existence of the "state action" relationship also imposes some new obligation on the government. If the per-

---

that the termination of service by a state-regulated electric utility did not constitute "state action" subject to the Fourteenth Amendment's due process clause. For the reason stated in text, however, we do not undertake the sifting of particular facts and circumstances necessary to say whether the same is true of the employment practices of the various kinds of Commission regulatees, among them some that are actually situated "upon . . . the public lands and reservations of the United States." 16 U.S.C. § 797(e) (1970). *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[49] *See, e.g.*, Evans v. Newton, 382 U.S. 296, 302 (1966) ("public character" of recreation facility required that it be "treated as a public institution subject to the command of the Fourteenth Amendment"); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (lessee of state property must comply with proscriptions of Fourteenth Amendment); Terry v. Adams, 345 U.S. 461 (1953) (exclusion of Negroes by county political organization held unconstitutional); Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of Negroes by state political party held unconstitutional); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (federally funded hospital may not discriminate on racial grounds).

sistence of such a relationship between the government and one practicing racial discrimination constitutes an ongoing constitutional violation, for example, perhaps the government incurs an obligation to terminate the relationship.[50] This like other obligations of the government would be enforceable in a court of law, and, if it had not already been so enforced, would presumably be a ground for objecting in proceedings before the Commission to license renewals and the like.

But the petitioners urge on us a third possible consequence of the "state action" relationship, namely, that while that relationship lasts the government must affirmatively regulate its private partner to insure that the latter discharges the constitutional obligations devolving upon it because of the relationship. Precedent for an agency's being constitutionally required to detail the constitutional obligations of its regulatees is very limited, however. In *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), a division of this court, with one judge dissenting, held that the Constitution prohibited regulated broadcasters from rejecting all controversial advertising, and the FCC was commanded to develop "reasonable regulatory guidelines"

---

[50] *See, e.g.*, McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (Treasury Secretary enjoined from extending tax benefits to private clubs and fraternal orders that excluded Negroes); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), *aff'd sub nom.* Green v. Colt, 404 U.S. 997 (1971) (federal government permanently enjoined from extending tax benefits to racially segregated private schools); Green v. Kennedy, 309 F.Supp. 1127 (D.D.C. 1970) (preliminary injunction in same case); Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970) (state liquor license of fraternal order that excluded Negroes held invalid), *rev'd sub nom.* Moose Lodge No. 407 v. Irvis, 407 U.S. 163 (1972); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) (state enjoined from entering construction contracts with private parties practicing employment discrimination).

to carry out this constitutional command. *Id.* at 665.[51] That decision was, however, reversed by the Supreme Court *sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). The notion of constitutionally requiring the FCC to regulate in a certain way was the specific subject of considerable criticism by the Court, *id.* at 125-27, though it no doubt was concerned with the problem that regulation of broadcasters under the authority of the First Amendment would itself raise First Amendment problems.

Moreover, a requirement of affirmance regulation would raise many problems. Which of the various constitutional commands addressed in the first instance to the government must the government reinterpret for its private collaborators, and what degree of specificity is required? If, as we have found to be true in the case before us, an agency lacks the statutory power to "regulate" in this way, does the Constitution itself piggy-back such power onto the statutory powers whose exercise gave rise to the state-action relationship? No such problem exists where the private entity is directly subject to the legislature without the intercession of an agency, but the proposition then becomes a truly anomalous one, namely, that the Constitution compels the legislature affirmatively to legislate in a certain way.

---

[51] *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961) ("By its inaction, . . . the state has . . . made itself a party to the refusal of service. . . .) (dictum); Public Utilities Commission v. Pollak, 343 U.S. 561 (1952) (where challenge made to government's allowance of allegedly unconstitutional conduct of regulatees, the Court found it "appropriate to examine into what restriction . . . the First and Fifth Amendment place upon the Federal Government") (dictum).

III

In the light of what has been said above, the position taken by each side appears to be partially right and partially wrong. Insofar as petitioners maintain that the Commission is not completely without jurisdiction to consider, and indeed to write regulations concerning, employment discrimination by its regulatees, they appear to be correct. It is also clear, however, that they have proposed a rule which, at least in certain of its provisions, is well beyond the Commission's power to adopt. Section 9, for example, imposing on the Commission the duty to entertain and to act upon individual discrimination complaints, seems to us not reasonably related to the furtherance of the Commission's proper objectives. The hearing and adjudication of individual complaints would be an inordinately time-consuming process in view of the very slight impact it might have on the efficient operation of the regulated industries. On the other hand, those sections providing for the annual filing with the Commission of a form already due the EEOC (section 6), and for intervention and receipt of evidence in Commission proceedings (sections 10 and 11), might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations in the ways described in Part II of this opinion.

We do not attempt a section-by-section appraisal of the rules at this time. That would be inappropriate on this record, and in the absence of prior Commission consideration in rule making by reference to the statutory boundaries to its authority demarcated hereinabove.

Turning briefly to constitutional considerations, we doubt for reasons already stated that the Commission is required to enforce the constitutional obligations of its regulatees by affirmative regulations. The Commission

does not appear to have refused *all* affirmative regulation, however. In this context the confusion over this point in the record, along with our practice of not deciding constitutional questions unnecessarily, persuades us not to pursue the matter any further, except to say that, however we might resolve our difficulties with the proposition that the Commission is constitutionally required to adopt *some* anti-discrimination rule, we are very sure that it is not required to adopt *this* one. Constitutional obligations are occasionally translated by the courts into terms as detailed, specific, and far removed from the constitutional language as are the terms of this rule. *See, e.g., Miranda v. Arizona*, 384 U.S. 426 (1966); *United States v. Frazier*, 317 F. Supp. 1079 (M.D. Ala. 1970). This is done only occasionally, however, and after some experience has shown the need of such strict prophylaxis. In any case, it is not the courts but the Federal Power Commission which must particularize any constitutional obligation that may exist, and this task should certainly be left in the first instance to the Commission.[52]

If the petitioners have been extravagant in their claims, however, the Commission has been miserly in its response. The request for the adoption of the proposed rule may have been excessive, but it is not at all clear that the Commission was free to consider that this was the only request made. It was not in any event free to deny even that request for the reason (if it was its reason) that it had no authority whatsoever to promulgate any rules relating to employment discrimination.

The result for the purposes of the disposition of this review proceeding is that the important jurisdictional

---

[52] Even in *Business Executives Move for Vietnam Peace, supra* note 67, this court chose to "leave the Commission and licensee broad latitude to develop 'reasonable regulations.'" 450 F.2d at 663.

questions inherent in it have not been framed in a meaningful way. The parties themselves have blunted and obscured their extreme positions to the point of retreat, although one that cannot in either case be exactly measured. Not wishing to be understood either to imply by a reversal that the petitioners' proposed rule could be adopted as is, or to endorse by an affirmance the Commission's broad disavowal of any jurisdiction over racial discrimination by its regulatees, we have concluded that the wisest course is to vacate the Commission's order and remand for further proceedings consistent with this opinion.[53]

It is so ordered.

---

[53] We have concerned ourselves herein only with the Commission's jurisdiction—with its power to adopt rules relating to employment discrimination. Nothing has been said of the Commission's considerable discretion, in common with other agencies, not to promulgate rules even when it has the authority to do so. The Commission might well determine that rule making in the area of employment discrimination, though permissible, should be deferred at least temporarily in favor of the information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings. Since the Commission did not purport to exercise such discretion in this case, the question of whether it could validly do so is not before us.

Before the

FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and

vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertise-

ments in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing senior-

ity practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rate of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permission to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to

the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provided reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

APPENDIX E

JUDGMENT OF THE

UNITED STATES COURT OF

APPEALS FOR THE DISTRICT

OF COLUMBIA CIRCUIT

(No. 72-1959, February 5, 1975)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1959 September Term, 1974

The National Association for the
Advancement of Colored People, et al.,
Petitioners

v.

Federal Power Commission, Respondent

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Chief Judge,
McGowan and MacKinnon, Circuit Judges

J U D G M E N T

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the Commission's order on review herein is hereby vacated and the case is remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Date: February 5, 1975

Opinion for the Court filed by Circuit Judge MdGowan.

FILED FEB. 5, 1975

HUGH E. KLINE
Clerk